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The Visual Literacy of Māori Law

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Tuhinga Whakarāpopoto | Abstract

In recent decades, the consideration of Māori law in Aotearoa New Zealand state law has taken on a new momentum. Law schools are improving their teaching of tikanga and Māori law in compulsory and specialist law papers. The judiciary more often cites Māori law as relevant to legal decisions. The Māori Land Court has normalised the use of tikanga and Māori law in its deliberations, and the District Court has new expectations for the use of tikanga Māori in its processes. This is not to say that the way Māori law is incorporated in or recognised by these institutions of the state, and state law itself, is a settled matter. A conversation on this is taking place in Aotearoa New Zealand, and this thesis is intended to contribute to that conversation.

This thesis explores the questions of what Māori law is and what some of the objects of Māori law are. It reviews what the non-written visual means of documenting Māori law might be and how these means help to communicate Māori law. This thesis draws on legal theory and education and art theories of visual literacy and encoded objects to investigate whether Māori law is documented in whakairo Māori – specifically in the Māori art forms of tā moko, pou whenua, and raranga. Tā moko is the art of tattooing marks into the body, particularly the face but also the legs, body and arms. Pou whenua are tall upright wooden carvings placed in or on the ground and used to identify whakapapa to and mana whenua over lands and waters. Raranga is the art of weaving, which is extensively used in the making of garments and domestic tools.

Māori law is documented in objects and visual markings just as objects (such as law books) and visual markings (such as writing) document state law in Aotearoa New Zealand. This thesis considers the evidence for that documentation of Māori law. Seven core principles of Māori law are explored and applied to three chosen forms of whakairo Māori.

This thesis acknowledges how Indigenous jurists have critiqued Western attitudes about Indigenous laws, confirming the resilience of both Māori law in Aotearoa New Zealand and contemporary Indigenous jurisprudence. The thesis demonstrates that Indigenous peoples, including Māori, can be said to have documented their law in creative art forms. There are examples of whakairo Māori that can be read as encoded with the principles of Māori law. As such, this thesis establishes that Māori were a literate culture pre-colonisation. It suggests that any failure to understand whakairo Māori as documenting legal information is a failure of literacy by the reader – not a failure of literacy of te ao Māori itself.

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Tuatoru, ka mihi aroha ki tāku whānau. Mum, thank you for teaching me weaving, being deeply creative, the smartest person I know and always loving and supportive. And Tania for your encouragement and always having my back.

My love, Worik, for all the things, all the time.

For you, Piupiu and Wilhelmina, and for Koro.

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Glossary of Māori Terms

For more comprehensive interpretations, consult the online version of *Te Aka Māori-English, English-Māori Dictionary and Index*, https://maoridictionary.co.nz/

ahikā	rights to occupy by descent
ahikāroa	title to land by occupation
Aotearoa	Māori name for New Zealand
atua	deity, deities
awa	river
ea	resolution, to be satisfied, gratified
hara	harm, wrong, hurt
He Kupu Arataki	Introduction
He Kupu Whakamutunga	Concluding Remarks
He Mutunga	Summary
hui	gatherings, meetings, assemblies
Hine-Ahu-One	first woman shaped from red soil by Tāne nui a Rangi
Hine Nui te Po	goddess of the underworld, she was Hine Titama but transformed after a trauma
Hine te Iwaiwa	goddess of the moon, weaving and childbirth
Hine Titama	first human child, child of Hine-Ahu-One-ahu-one and Tāne Mahuta, transformed into Hine Nui te Po
ihi	psychic force, charm
iwi	Māori tribes
kai	indicates a person or role
kaitaka	highly prized cloak
kaitiaki	trustee
kaitiakitanga	trusteeship, guardianship
kakahu	clothing
karakia	ritual chant, prayer
ka tika tō mate	symbolic violence
kawa	customs, protocols
kete	bags
kinikini	woven kilt
koha	gift, contribution
kōrero	speak, talk
korowai	woven cloak
kupu	word, vocabulary

nō	belonging to, indicates achieved possession
mana	status
manaaki	hospitality, show respect for, support
mana atua	spiritual realm of responsibility
mana motuhake	independence, sovereignty
mana tangata	human realm of responsibility
mana whenua	territorial authority over lands and waters
manuhiri	guests
mātanga	expert
mataora	full face moko
mātauranga Māori	Māori knowledge
maunga	mountains
mauri	life principle, vitality
mere	short weapon
moana	ocean
mokemoke	lonely
moko kauae	female chin moko
muru	compensation, form of social control, restorative justice
ohākī	a performed will
pana	banish, exclude as punishment
Papatūānuku	earth mother, the earth
pepeha	formalised recitation
Pitopito Kōrero	Notes
piupiu	flax kilt-like garment that swings
pou whenua	land marker posts
pounamu	greenstone
pūrākau	story
rāhui	ritual prohibition
rangatira	chiefly, high rank, esteemed
rangatiratanga	sovereignty, political responsibilities
ranginui	the sky
raranga	weaving
rarohenga	underworld
raupatu	conquest
rongo-a-whare	women as emissaries
Rongomatane	god of cultivated food

rūnanga	council, to discuss in an assemble
tahuaroa	large wooden frames for displaying taonga
take moe whenua	marriage confirmation
take tūpuna	ancestral rights and connections
takiwā	district, territory, region
tā moko	tattooing
Tāne Mahuta	god of forests and birds
tanga	suffix to make verbs into nouns, indicates time or circumstance
Tangaroa	god of seas, sea creatures
tangihanga	funeral
taniko	embroidery
taonga	sacred objects, treasures
taonga tuku iho	ancestral treasure
tapu	sacred, prohibited, set apart
tatai	links
tautohetohe	debate
Tāwhirimātea	god of winds, rain, hail, snow
te Ao Mārama	the dawn of time
te Ao Tūroa	world of light
te Kore	the void of space and time
te Pō	the long darkness
te taiao	environment, landscape
Te Tiriti O Waitangi	the Treaty of Waitangi
te wāhanga	chapter
tekoteko	carved figure on the gable of a meeting house
tiaki	to care for, guard, look after
tika	correct, true, lawful
tikanga	correct procedure, customary system of Māori values and practices
tīwaiwaka	fantail
Tuhinga Whakarāpopoto	Abstract
tuku	to relinquish, cede, grant or gift
tūpuna	ancestors, grandparents
turangawaewae	one’s place to stand and belong through kinship
ture	law, rule
tūrehu	fairy
upoko	leader

utu	balance, response, consequence
waiata	songs
waiata kākahu	protective song
waka	origin canoe, canoe
whaikōrero	Oration, to address
whakairo	carvings, to ornament with a pattern
whakairo Māori	Māori visual art
whakamā	shame
whakamana	empower, legitimise
whakapapa	genealogy
whakawā	adjudication, determination
whānau	family
whanaunga	relations, kin
whanaungatanga	relationship, kinship, sense of family connection
whariki	mat
whenua	land

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Pitopito Kōrero | Notes

Use and Translation of te reo Māori

Te reo Māori kupu | words are used frequently in this thesis. I do not translate very commonly used kupu such as reo, Māori, or tikanga. Where uncommon kupu are translated from te reo Māori into English in the text I use the vertical line to indicate the translation (e.g., pana | banish). I use this translation technique frequently to facilitate understanding and ease of reading. The definitions are from https://maoridictionary.co.nz/, the online version of *Te Aka Māori-English, English-Māori Dictionary and Index*, unless otherwise described in the text.

When describing cultural concepts and activities of an Indigenous nation, I use that nation's language where possible. Where I do not know that language, I will use the term that would be used if it were a Māori context. I translate Indigenous concepts into te reo Māori where possible because I feel that te reo Māori kupu provide a better translation of Indigenous concepts than English words. This expresses my personal preference for how Indigenous concepts and relationships can be best described in an English-language thesis. For example, when I describe the *Saltwater Collection* of bark paintings, presented as evidence in *Gawirrin Gumana v Northern Territory of Australia (No1)* [2005] FCA 50, I use the kupu 'kaitiaki' for guardian, 'tapu' for sacred, 'atua' for 'deity', and 'whakapapa' for 'related', as in the following example:

> In 1996 a kaitiaki, Waka Munungurr, found an illegal barramundi fishing camp in a tapu area called Garranali. Garranali is the home of Bäru, an atua in human and crocodile form. The Madarrpa clan who are kaitiaki of that area whakapapa to that atua.

Citation

Citation is in accordance with the *New Zealand Law Style Guide*, 3rd edition.

Te Wāhanga Tuatahi – He Kupu Arataki | Introduction

In this chapter, I introduce the question that is the focus of this thesis: Is Māori law documented in whakairo Māori | Māori visual art? This question is best answered by dividing it into two parts. First, what are the non-written visual means of communicating Māori law? Second, how can these non-written visual means help to communicate Māori law? The thesis, then, considers whether there is a visual language in whakairo Māori that can communicate legal information. Whakairo Māori includes several creative art forms. The ones that I will look at in this thesis are tā moko | tattooing, pou whenua | land marker posts, and raranga | weaving.

I first describe the context to this thesis. I then set out my claim that Māori law exists as an authoritative and enforceable source of rights and obligations in Aotearoa New Zealand and provide a brief situation update of the current role of Māori law in Aotearoa New Zealand's legal system. This flows into a description of my research aims. I then discuss Kaupapa Māori research theory and how I am applying it in this thesis. I conclude this Introduction with an outline of how each subsequent chapter seeks to address my research aims.

I. Navigating Research: Thesis Context

I currently work as a Research Fellow in the Faculty of Law at the University of Otago. In this role, my research contributes to a national research project on how to indigenise the New Zealand LLB law degree; that is, how to create a bijural legal education where Māori law is taught alongside New Zealand state law to all law students.[1] At a law faculty staff retreat a year or so ago, the law academics were talking about why they did, or more accurately, why they wanted to do research. They discussed what made research compelling for them.

I did not offer my thoughts; I was too new to the institution. But I did think that, for me, it is such a thrill making connections from seemingly unconnected ideas and, in the process, creating new ideas to be challenged and interrogated. I am a textile artist, and this is what I

[1] Jacinta Ruru and others *Inspiring National Indigenous Legal Education for Aotearoa New Zealand's Bachelor of Laws Degree* (Michael and Suzanne Borrin Foundation, Wellington, 2020).

naturally do in my textile and photography art practice in Indigenous Futurism.[2] It seems natural to do the same in my academic legal research. Research is like art, in my view. It is a navigation across choppy unpredictable seas between islands of knowledge, during which I can map out a new idea, a new connection.

The connection that I am focused on in this thesis is that between art and law. Tracing a new theoretical connection between art and law might seem like a tricky journey, at least when approached from my traditional Western legal and Western art education. Western law is dense, logical, and strict.[3] Western art is the opposite – emotive, ambiguous, and ephemeral.[4] Often they are only considered together through intellectual property law and contract law.[5] However, this thesis evolved from making a new connection, one that is apparent whether considered from a Western or Indigenous point of view: both art and law are human tools for communication. I see art and law as both being drawn from the human mind and our desire to connect with others, to share and explore relationships. Both are drawn from stories we tell ourselves and others about the world and how we inhabit it. Both provoke strong feelings and challenge our thinking. These commonalities form my waka | canoe for tracing the map of a new connection between Māori law and Māori art, which is the work of this thesis.

This thesis aims to show that there are non-written visual means of communicating the legal stories of te ao Māori. I propose that Māori law can be encoded within Māori art, specifically whakairo Māori. The kupu | word 'whakairo' means to carve or to ornament with a pattern. 'Whakairo' can also mean carving or refer to other ornamented art forms. For example, 'toi whakairo' means the art of carving, and 'kete whakairo' refers to the art of finely woven baskets or textiles. 'Whakairo Māori,' therefore, is a broad term that refers to Māori visual art such as

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[2] Indigenous Futurism is a creative theory that utilises the science, technology, history and colonising experience of Indigenous peoples in imaging a speculative, technologically advanced future in which Indigenous peoples are centred. See generally Grace L Dillon *Walking the Clouds: An Anthology of Indigenous Science Fiction* (University of Arizona Press, Tucson, 2012); Lillia McEnaney "Indigenous Futurisms: Transcending Past/Present/Future" (2020) 36 Visual Anthropology Review 417; and Blaire Topash-Caldwell "Sovereign Futures in Neshnabe Speculative Fiction" (2020) 19 Borderlands 29.

[3] See HLA Hart *The Concept of Law* (Clarendon Press, Oxford, 1961); John Austin *The Province of Jurisprudence Determined* (John Murray, London, 1832).

[4] Claudia Muth, Vera Hesslinger and Claus-Christian Carbon "The Appeal of Challenge in the Perception of Art: How Ambiguity, Solvability of Ambiguity, and the Opportunity for Insight Affect Appreciation" (2015) 9(3) Psychology of Aesthetics, Creativity, and the Arts 206 at 208. See for example Richard K Sherwin *Visualizing Law in the Age of the Digital Baroque: Arabesques and Entanglements* (Routledge, London, 2011)

[5] See Sam Ricketson *International Copyright and Neighbouring Rights* (2nd ed, Oxford University Press, New York, 2006).

tā moko | tattooing, pou whenua | land marker posts, and raranga | weaving.[6] I suggest that Māori used these visual literacy modes to encode a visual language into whakairo Māori, and that that visual language can be read, understood, and communicated to others.

There is a long and rich history of visual communication to draw on when we consider how we have shared ideas with each other through visual markings in visual art during our long maturation as humans. The written kupu is only one form of communication; there are others. And while the written kupu is an utter delight, before its conception human civilisations communicated complex ideas about themselves and their relationships in visual forms. Therefore, I explore in this thesis how Indigenous contemporary and historical visual art can be used to help communicate Indigenous legal traditions in a way that is useful and maintains the integrity of Indigenous law. I focus on Aotearoa and, to a lesser degree, Canada and Australia because in these three colonised countries there is a strong resurgence of legal and creative Indigenous self-determination.

I accept that I am hindered in my research by my lack of expert fluent knowledge of te reo Māori, particularly in understanding and relating historical examples. There is much of my inherited Māori knowledge that I cannot access, and this is a common experience of Indigenous peoples in colonised nations. I hope that this thesis becomes its own waka for me and others and that, in the future, more skilled navigators can traverse deeper waters and make new maps of mātauranga Māori | Māori knowledge, whakairo Māori and Māori law.

II. Māori Law Is the First Law

This thesis is grounded in the acceptance that Māori law is the first law of Aotearoa New Zealand. As Chapter 5 will demonstrate, Māori law is a taonga tuku iho | ancestral treasure and continues to inform and influence Māori today. Māori law has had a place in Aotearoa New Zealand state law since the signing of te Tiriti o Waitangi | the Treaty of Waitangi in 1840.[7] The New Zealand Law Commission notes that in the early years of colonisation, Māori law

[6] Hirini Moko Mead *Te Maori: Maori Art from New Zealand Collections* (Heinemann Publishers (NZ), Auckland, 1984) at 21.

[7] For a full discussion of the history of Māori custom law in New Zealand, see New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (SP9, NZLC, 2001).

was recognised by British state officials as valid, and used by Māori to manage their affairs.[8] The British Minister is said to have instructed Governor Hobson with the following:[9]

> [The Maori people have] established by their own customs a division and appropriation of the soil… with usages having the character and authority of law … it will of course be the duty of the protectors to make themselves conversant with these native customs.

Legislation such as the now repealed Native Exemption Ordinance 1844, the Resident Magistrates Courts Ordinance 1846 and Resident Magistrates Act 1867 and, somewhat notoriously, section 71 of the New Zealand Constitution Act 1852 all recognised the validity of Māori customary law. For example, section 71 of the latter Act provided for autonomous Māori territorial districts where: [10]

> the Laws, Customs, and Usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general Principles of Humanity, should for the present be maintained for the Government of themselves, in all their Relations to and Dealings with each other.

However, it was only a decade or so later that the legislature began to pass legislation that was designed to extinguish Māori law, such as the Native Titles Act 1865, the preamble of which reads:[11]

> WHEREAS it is expedient to amend and consolidate the laws, relating to lands in the Colony which are still subject to Maori proprietary customs and to provide for the ascertainment of the persons who according to such customs are the owners thereof and to encourage the extinction of such proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown and to provide for the regulation of the descent of such lands when the title thereto is converted as aforesaid and to make further provisions in reference to the matters aforesaid.

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[8] At 8.

[9] At 82.

[10] At 84. See also Robert Joseph *The Government of Themselves: Case Law Policy and Section 71 of the New Zealand Constitution Act 1852* (Te Mātāhauariki Institute, Waikato, 2002) for a comprehensive discussion on section 71.

[11] Preamble, Native Titles Act 1865.

Māori law had been recognised as extant and operable in the very early years of the colonial government, but was undermined by later settler law, at least in part because Māori law was an impediment to the alienation of land for settler use.[12] At times Māori law has been recognised by the state legal system as enforceable and relevant[13] and other times it has been dismissed,[14] but it has always occupied a place both separate from and within the state legal system. In recent decades, however, the consideration of Māori law in state law has taken on a new momentum. Law schools have improved both their teaching of tikanga and Māori law in compulsory and specialist law papers. The judiciary more often cites Māori law as relevant to legal decisions.[15] The Māori Land Court has normalised the use of tikanga and Māori law in its deliberations,[16] and the District Court is to utilise te reo Māori and tikanga Māori in its processes.[17] With the increase in the number of Māori judges at all levels of the court,[18] a Māori Chief Judge of the District Court, and a Māori Supreme Court justice, there is more and more

[12] New Zealand Law Commission, above n 7, at 22.

[13] See *Nireaha Tamaki v Baker* (1901) NZPCC 371; *Te Weehi v Regional Fisheries Officer* [1986] NZLR 680; and *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.

[14] See *Wi Parata v Bishop of Wellington* [1877] 3 Jur (NS) 72.

[15] See *Re Edwards (Te Whakatōhea) (No 2)* [2021] NZHC 1025; *Ngawaka v Ngāti Rehua-Ngātiwai Ki Aotea Trust Board* [2021] NZHC 291; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86; *Takamore v Clarke* [2012] NZSC 116; and *Peter Hugh McGregor Ellis v The Queen* SC 49/2019 NZSC Trans 31. For a discussion on the implications of judicial decisions citing tikanga Māori, see also Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2015) 1 NZLR 1; Jacinta Ruru "First Laws: Tikanga Māori in/and the Law" [2018] VUWLR 279; and Annette Sykes "The Myth of Tikanga in the Pākehā Law" (5 December 2020) <https://cdn.auckland.ac.nz/assets/law/Documents/centres/indigenouscentre/Final%20Nin%20Tomas%20Memorial%20Lecture%205%20December%202020.pdf>.

[16] Te Ture Whenua Maori Act 1993. Section 7(2)(a) requires judges to have experience of tikanga Māori and te reo Māori before they are appointed to the Māori Land Court.

[17] For the most recent example, see the announcement of the Te Ao Mārama model for New Zealand's District Courts in Heemi Taumaunu "Norris Ward McKinnon Annual Lecture 2020" The District Court of New Zealand (11 November 2020) <https://www.districtcourts.govt.nz/reports-publications-and-statistics/publications/norris-ward-mckinnon-annual-lecture-2020/ >. The model includes innovations such as infusing te reo and tikanga Māori into the court processes; making more information about the offender, such as cultural background, available to judges; solution-focused judging; minimising formalities; improved community involvement; and interagency coordination.

[18] In January 2020, the Attorney General announced the appointment of 21 new District Court judges, 11 of whom were Māori. See "Māori Dominate in New Appointment of District Court Judges" RNZ (22 January 2020) <https://www.rnz.co.nz/news/te-manu-korihi/407875/maori-dominate-in-new-appointment-of-district-court-judges>. In February 2021, the Attorney General announced the further appointments of 3 new District Court judges, including Judge Ophir Cassidy (Ngāti Porou, Ngāti Whātua ki Kaipara), the first judge to be appointed with a moko kauae | female chin tattoo. See David Parker "Three District Court Judges Appointed" Beehive.govt.nz (25 February 2021) <https://www.beehive.govt.nz/release/three-district-court-judges-appointed>.

judicial and extra-judicial writing on the incorporation of tikanga Māori into New Zealand law.[19]

During the research and writing of this thesis, I have seen an increasing reference to Māori law in caselaw, even in just the last year. In 2021, Churchman J in the High Court, in *Re Edwards (Te Whakatōhea) (No 2)*,[20] summarised the recent judgments that restate the validity of tikanga Māori in New Zealand's legal system. He refers to the comment from Palmer J in *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board* that "[t]ikanga Māori was the first law in Aotearoa. It is recognised by Acts of Parliament. It is also recognised by the common law of New Zealand."[21] Churchman J also refers to *Trans-Tasman Resources Limited*, where the Court held that the consideration of tikanga requires understanding of key concepts as understood by Māori because it is:[22]

> axiomatic that the tikanga Māori that defines and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral strand of the common law of New Zealand.

Churchman J is clear from the recent decisions from the higher courts that the issues of tikanga are being debated and discussed regularly and with recognition that Māori are the experts on tikanga Māori and Māori law:[23]

> I reiterate here that it is not the role of the Court to define the tikanga of the applicants. As I discuss at [308] below, the proper authorities on tikanga are those who have been tasked or honoured with the mātauranga of their tīpuna – the knowledge and wisdom passed down to them by their ancestors.

That is not to say that the way Māori law is incorporated in or recognised by state law is a settled matter. There remain important questions related to the approach of the courts to the incorporation of tikanga Māori into state law. One question relevant to this thesis is whether the courts are prepared to recognise tikanga Māori as an authoritative legal tradition in its own right, with a clear and separate set of legal principles, or whether it will treat tikanga Māori and

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[19] See Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 94.

[20] *Re Edwards (Te Whakatōhea) (No 2)*, above n 15, at [272].

[21] *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board*, above n 15, at [2].

[22] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 15 at [177], discussed in *Re Edwards (Te Whakatōhea) (No 2),* above n 15, at [277] as per Churchman J.

[23] *Re Edwards (Te Whakatōhea) (No 2),* above n 15, at [272].

Māori 'custom' law as evidence to be weighed against other matters within the state legal system's provisions. For example, while Elias CJ in *Takamore v Clarke* does say, in obiter, "Māori custom according to tikanga is therefore part of the values of the New Zealand's common law",[24] the Court nonetheless goes on to determine that, in this case, tikanga Māori burial laws are only a relevant consideration among many:[25]

> The common law is not displaced when the deceased is of Māori descent and the whanau invokes the tikanga concerning burial practices, as has happened in this case. Rather the common law of New Zealand requires reference to the tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation.

As such, the Court accepted that tikanga Māori is relevant, but as evidence within the common law, not as a law against which evidence can be weighed.[26] This is an important distinction to keep in mind when considering how the non-written documentation of Māori law may or may not be recognised as authoritative in its own right, within its own legal tradition.

A conversation on this is currently taking place in Aotearoa New Zealand, and this thesis is intended to contribute to that conversation. I am currently involved in ongoing research with Māori law academics, in consultation with Māori and the legal community, to determine whether advanced teaching of Māori law should occur in law schools and what the boundaries of that teaching should be. Some Māori commentators caution that incorporating tikanga into state law may be an ongoing colonisation or sublimation of tikanga.[27] Those risks are very real, and more conversation is needed to determine whether and how they can be managed. The kinds of questions that need to be asked include:

- How can we make clear the contemporary relevance of Māori cultural ideas and concepts, beliefs and connections to people who have been largely taught that such things are relics of either a romanticised or obliterated past?

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[24] *Takamore v Clarke,* above n 15, at [94].

[25] At [164], per McGrath J.

[26] For a detailed discussion of this issue from *Takamore*, see Coates, above n 15.

[27] Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 330 at 344. See also Robert Joseph "Re-creating Space for the First Law of Aotearoa-New Zealand" (2009) Wai L Rev 17 at 74.

- How can we use English legalese to communicate multicultural concepts when those very English words are designed to place elitist boundaries around legal knowledge to the exclusion of Māori cultural legal concepts?
- How can we whakamana | empower mātauranga Māori | Māori knowledge in a Pākehā law school?

This thesis rests on the claim that Māori law exists as an authoritative and enforceable source of rights and obligations in Aotearoa New Zealand.[28] I explore and justify this claim in Chapters 2, 5 and 6. In this introductory chapter I want to be clear from the outset that when I apply legal concepts to art forms, I am applying the Māori legal tradition to whakairo Māori. I privilege Indigenous and Māori perspectives in this thesis as part of my Kaupapa Māori research practice. This thesis is not concerned with how state law recognises the documentation of Māori law in whakairo Māori. However, I do discuss state law in detail in three ways.

First, I discuss the impacts of coloniality on Māori law in Chapter 2 because it is necessary to provide context for the analysis of Māori law later in the thesis. Māori law has been undermined by the process of coloniality. Māori have often been wrongly described as having 'lore' rather than 'law' as a consequence of coloniality. The current reassertion of Māori jurisprudence is occurring within that context and therefore that context needs to be described.

Second, I refer to four examples (three of which are from overseas) where state law has responded to non-written visual documentation of Indigenous law. Those examples are the *Saltwater Collection* and the *Ngurrara Canvas II* in Chapter 3, wampum belts in Chapter 4, and pou whenua in Chapter 6. These four examples demonstrate how Indigenous peoples have encoded their law into non-written visual works. The state legal system's response to those works provides context for Indigenous resilience in utilising their cultural literacy forms for documenting their law. Finally, in the concluding chapter to this thesis, I offer some remarks about the interface of the state legal system and the Māori legal tradition.

[28] Ruru and others, above n 1, at 38.

III. Research Aims

When thinking about the documentation of Indigenous laws and how Indigenous laws are communicated, it seems obvious to me that objects and visual markings would be used for that purpose, just as objects (such as law books) and visual markings (such as writing) are used in Aotearoa New Zealand to communicate state law. So, in this thesis I explore what I call the visual literacy of Māori law. My central research question, which is addressed in two parts, considers:

1) Is Māori law documented in whakairo Māori?
    a. What are the non-written visual means of communicating Māori law?
    b. Can these non-written visual means help to communicate Māori law?

In order to explore these questions, I utilise a Kaupapa Māori and interdisciplinary law and visual art approach. I bring together the educational theory of visual literacy, the art theory of encoded objects, and the jurisprudence of Māori law and apply them to whakairo Māori to see if whakairo Māori can be said to document law. Following the practice of Tā Hirini Moko Mead, I use the term 'whakairo Māori' throughout the thesis as a general term for Māori art or creative works.[29] This term can include carving, ceramics, weaving and painting. It can also include song, dance and poetry. There are Māori creative works that are designed for a specific function or for primarily decorative purposes. And there are also creative works that can be understood as 'encoded objects'. Encoded objects are art or creative works that have been encoded by the maker for a more complex communication purpose than merely decoration. Tā Mead describes such art and creative works as 'taonga tuku iho'[30] because, regardless of their age, they represent a "gift from the ancestors to their descendants born and yet unborn".[31]

I will focus my consideration of whakairo Māori on tā moko | tattooing, pou whenua | land marker posts, and raranga | weaving. Tā moko is the practice of tattooing of marks into the body, particularly the face but also the legs, body and arms. Pou whenua are tall upright wooden whakairo | carvings placed in or on the ground and used to identify whakapapa | genealogy and mana whenua | territorial authority over lands and waters. Raranga is the practice of weaving

[29] See Mead, above n 6.

[30] At 21.

[31] At 23.

and has extensive use in the making of garments and domestic tools such as kete | bags and nets. I use specific examples of each to argue that Māori were a literate culture pre-colonisation, with an extensive visual literacy cultural practice expressed through whakairo Māori. I propose that any failure to understand whakairo Māori as holding legal information is a failure of literacy on the part of the reader – not a failure of literacy on the part of te ao Māori itself.

IV. Kaupapa Māori Methodology

This thesis applies a Kaupapa Māori methodology with an emphasis on mātauranga Māori | Māori knowledge and Indigenous scholarship. I understand that Kaupapa Māori research methodology centres the Māori world view in research work.[32] Dr Leonie Pihama describes Kaupapa Māori theory as neither dualistic nor binary in that it is not concerned to assert the superiority of any one world view, set of traditions or culture. Rather, it is "an assertion of the right for Māori to be Māori on our own terms and to draw from our own base to provide understandings and explanations of the world".[33] Critical Indigenous pedagogy recognises that "all inquiry is both political and moral"[34] and that Indigenous methodologies and research practices "privilege Indigenous knowledge, voices and experiences".[35]

Therefore, wherever possible I privilege Indigenous knowledge, Indigenous sources and Indigenous scholarship in this thesis. One practical means by which I can assert Indigeneity in my research process is to make sure that I seek out Indigenous scholars and, where appropriate, review, critique and cite their research. My citation practice is designed to achieve two goals in the writing of this thesis. First it means that Indigenous perspectives on what words and concepts mean, how they can best be used, and what ought to be priorities, dominate the

[32] Linda Tuhiwai Smith *Decolonizing Methodologies* (2nd ed, Otago University Press, Dunedin, 2012).

[33] Leonie Pihama, Sarah-Jane Tiakiwai and Kim Southey *Kaupapa Rangahau* (2nd ed, Te Kotahi Research Institute, Hamilton, 2015) at 12.

[34] Norman K Denzin, Yvonna S Lincoln and Linda Tuhiwai Smith (eds) *Handbook of Critical and Indigenous Methodologies* (SAGE, London, 2008) at 2.

[35] Linda Tuhiwai Smith "On Tricky Ground: Researching the Native in the Age of Uncertainty" in Norman K Denzin and Yvonna S Lincoln (eds) *The SAGE Handbook of Qualitative Research* (3rd ed, SAGE, Thousand Oaks, CA, 2005) 85 at 116.

discourse. Linda Tuhiwai Smith encourages scholars to "reorient our reference points for knowledge" to make positive contributions to Indigenous ideas:[36]

> It is still desirable to read a wide literature by a range of Indigenous and non-Indigenous authors but the Western academy should no longer occupy the principal position or point of reference and authority on Indigenous subject matters.

Citation, therefore, is an exercise of power within the academy and can have real-world impacts on those who use research, in terms of whose voices are heard and whose voices are treated as authoritative:[37]

> Power, as always contested and negotiated, can be turned against itself to produce alternative modalities, histories, and narratives (Butler 2002). What citation does (and what we do when we cite) calls into being a particular idea of academic authority. Conceptualizing citation as a performative act means paying attention to why and how authority congeals around certain bodies and voices, and thinking through how this authority might be dismantled.

In my general research and in this thesis, I want to focus on the Indigenous perspective of law, art and jurisprudence as part of my contribution to the Indigenous intellectual tradition. This is my second goal of privileging Indigenous scholarship. In Aotearoa New Zealand, we have a more than 1,000-year-old tradition of rigorous Māori intellectual tautohetohe | debate. Too much of the content of that mātauranga Māori | knowledge has been lost through the colonisation process, but not the tradition, nor the skill or the joy of it. This approach to Indigenous scholarship has been used by many of my most important sources in this thesis. They include Tā Edward Taihākurei Durie, Carwyn Jones, Tā Hirini Moko Mead, Paul Meredith and Val Napoleon. I follow their example in continuing to place the Indigenous intellectual perspective at the forefront.

This thesis is also interdisciplinary in that I use theories from law, education and art to explore my thesis question of whether Māori law is documented in whakairo Māori. My own art practice is premised in Indigenous Futurism, an art theory that centres Indigenous peoples, strengths, technologies and views in the creative process and the creative works. Indigenous perspectives in art theory have been advancing in the last few decades, with the demise of

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[36] Smith, above n 32, at 201.

[37] Carrie Mott and Daniel Cockayne "Citation Matters: Mobilizing the Politics of Citation toward a Practice of 'Conscientious Engagement'" (2017) 24 Gender, Place & Culture 954 at 964.

notions of Primitivism in art[38] and the rise of scholarship about contemporary Indigenous art as a tool for decolonisation.[39] There remains a conceptual 'hangover' from Primitivism, however. Much of the analysis of 'authenticity' in Indigenous creative works is connected to how those works or the artists frame their art as sourced from, or representative of, nature or cultural tradition.[40] In response, Indigenous artists are more directly using their art for decolonising purposes, and writing about it. In *Indigeneity and Decolonial Seeing*, Kency Cornejo analyses Guatemalan artists using the Indigenous body as the primary creative site for the decolonising conversation:[41]

> [T]he Indigenous body remains the object of violence, historical discourse, and sociopolitical analysis and is rarely acknowledged as a voice or enunciation of visual epistemologies ... It appears that unless an artwork figuratively depicts village life, customs or landscapes (subject matter that fits within an already accepted folkloric style), Indigenous artists are disqualified from art narratives as creators of contemporary or experimental art, much less as contributors to an intellectual or philosophical artistic debate.

Indigenous artists make a powerful contribution to the Indigenous intellectual tradition by their 'visual epistemologies', creating new ways to see the world – both the colonised world and a decolonised future. By adding Indigenous creative contributors to the debate on how our future might be envisioned, the Indigenous intellectual tradition can theorise even better strategies for the decolonisation of our minds and creation of a decolonised nation, helping us to assert, in Aotearoa New Zealand, "the right for Māori to be Māori on our own terms".

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[38] Nelson HH Graburn "Authentic Inuit Art: Creation and Exclusion in the Canadian North" (2004) 9 Journal of Material Culture 141 at 143.

[39] See generally Morgan Perkins "Continuity and Creativity in Iroquois Beadwork" (2004) 106 American Anthropologist 595; Lillia McEnaney "Indigenous Futurisms: Transcending Past/Present/Future" (2020) 36 Visual Anthropology Review 417; and Phoebe Farris "Visual Power: 21 st Century Native American Artists/Intellectuals" (2005) 46 American Studies 251. For some general Māori perspectives see "Whatu Kākahu | Māori Cloaks (2nd ed, Museum of New Zealand Te Papa Tongarewa, Wellington, 2019); Christopher Braddock "Layne Waerea's Public Laughter" (2016) 69 Australasian Drama Studies 60; Deidre Brown and Ngarino Ellis *Te Puna Māori Art from Te Tai Tokerau Northland* (Reed Publishing (NZ) Ltd, Auckland, 2007); and Tryphena Cracknell *Momo kauae* (Hastings City Art Gallery, Hastings, 2014).

[40] Nelson HH Graburn, above n 38, at 143.

[41] Kency Cornejo "Indigeneity and Decolonial Seeing in Contemporary Art of Guatemala" (2013) 36–4 Fuse Magazine at 25.

V. Thesis Structure

After this introductory chapter, Chapter 2 presents Indigenous intellectual critique of coloniality and its impact on Indigenous law. Indigenous legal theorists have had to reassert the validity of Indigenous law in the face of centuries of coloniality that has undermined Indigenous legal traditions. The chapter makes some brief comments on the effect of colonisation on tikanga Māori in the 18th and 19th centuries before discussing the Indigenous critique of Western legal theory as it has been applied to Indigenous law. I then discuss the definitions of 'legal order' and 'legal tradition' drawing on the work of Val Napoleon and Carwyn Jones, and detail how the terms 'Māori legal order' and 'Māori legal tradition' will be used in Chapter 5 of this thesis.

Chapters 3 and 4 set out the art and education theories for this thesis, describing how multimodal literacy, visual literacy, and encoded objects will be used to understand how non-written visual means can document law. In Chapter 3, I discuss the education theory of visual literacy. Visual literacy is a communication tool that uses the ability to read, write and create visual images to communicate between people.[42]

In Chapter 4, I describe the art theory concept of the encoded object. Encoded objects are creative works those made for the purpose of holding and communicating cultural information as opposed to objects which are solely decorative or functional in purpose.[43] I argue that by understanding how Indigenous objects are encoded as documentation of Indigenous law we can develop the visual literacy to read these objects for the complexity of that information.

In Chapter 5, I use the definitions of 'legal tradition' from Val Napoleon and Carwyn Jones discussed in Chapter 2 to identify the core legal principles of the Māori legal tradition. I describe the five commonly agreed principles of the Māori legal tradition, which Jones describes as "foundational by leading scholars in the field",[44] and add kaitiakitanga and rangatiratanga to the list. I detail these seven legal principles of the Māori legal tradition, their

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[42] Maria Avgerinou and John Ericson "A Review of the Concept of Visual Literacy" (1997) 28 British Journal of Educational Technology 280 at 284.

[43] Howard Morphy "Encoding the Dreaming – A Theoretical Framework for the Analysis of Representational Processes in Australian Aboriginal Art" (1999) 49 Australian Archaeology 13 at 13.

[44] Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (University of British Columbia Pres, Vancouver, 2016) at 38. Jones cites Mead, above n 6 at 28–32; Joe Williams "He Aha te Tikanga Māori" (paper presented to the Mai I Te Ata Hāpara Hui, Te Wānanga o Raukawa, Otaki, 2000) at 8; and New Zealand Law Commission, above n 7 at 28–40.

core function, and some of the legal practices that arise from the application of the principles. This chapter helps to clarify the legal application of the principles when analysing how encoded objects, such as pou whenua, can hold legal information and be a form of legal documentation within the Māori legal tradition.

In Chapter 6, I consider how the principles of the Māori legal tradition may be encoded into whakairo Māori. This is the crux of my thesis inquiry. Having set out the theoretical basis for my analysis in the previous chapters, I now provide a detailed description of whakairo Māori, its whakapapa, and how Māori law might be read into tā moko | tattooing, pou whenua | land marker posts, and raranga | weaving. Finally, in He Kupu Whakamutunga, I make some remarks where I outline my conclusions on what the non-written visual means of communicating Māori law might be, and how these non-written visual means may help to communicate Māori law. My hope is that this thesis will contribute to the growing jurisprudence on the source, relevance and documentation of the Māori legal tradition and Māori law.

Te Wāhanga Tuarua – An Indigenous View of Law

> From the well spring of that wisdom came the authority which rangatira could exercise in the interests of their Iwi. It was an authority which had both temporal and spiritual aspects; an authority to wage war and maintain peace; an authority to protect and to destroy.
>
> It was an absolute authority over life and death; the power to make and be the law.[1]

In this chapter I set out my conception of Māori jurisprudence. This chapter is important because it provides the historical context for considering the non-written visual means of documenting Māori law. One impact of colonisation is that Māori law is not the dominant legal tradition in Aotearoa New Zealand today. Colonial thinking has undermined the legal authority of de-centralised kinship-based legal traditions, such as that found in te ao Māori. Consequently, Indigenous communities have often been wrongly described as having 'lore' rather than 'law'.[2] This question has been asked in Aotearoa, where there has been a decades-long debate on whether tikanga Māori had sufficient characteristics to be considered a legal tradition.

I begin by describing how colonisation undermined tikanga Māori and, in doing so, undermined it as a source of law. I then make reference to the work of two contemporary Indigenous legal theorists, Val Napoleon and Carwyn Jones, to demonstrate the rich jurisprudence that surrounds and supports Indigenous law and Māori law. I argue from this survey that Māori do have law and that the character of that law is capable of description and analysis.

This chapter sets the groundwork for Chapter 5, where I detail the content of the Māori legal tradition, and also for Chapter 6, where I argue that Māori law can be identified in three forms of whakairo Māori: tā moko | tattooing, pou whenua | land marker posts, and raranga | weaving. This chapter is important for this thesis because it will confirm the resilience and relevance of both contemporary Indigenous jurisprudence and Māori law in Aotearoa New Zealand, and therefore establishes the foundation on which the thesis is built.

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[1] Moana Jackson "Changing Realities: Unchanging Truths" (1994) 10 Aust JL & Soc 115 at 120.

[2] Edward Taihākurei Durie and others "Ngā Wai o te Māori: Ngā Tikanga me Ngā Ture Roia" (paper prepared for New Zealand Māori Council 2017) at 6.

I. Tikanga Māori: Values, Principles, Law

Law is a human social construction.[3] Social interactions require systems to help to manage the complex relationships that people create with each other through those interactions.[4] These systems are dynamic and change and adapt to meet the new needs, values and technologies of the cultures to which they belong.[5] Tikanga Māori is just such a body of values and principles. Tikanga Māori is the system that Māori people use to manage the relationships they have with each other, with their atua | deities, and with the natural world.[6]

Tikanga Māori has been described as a values-based legal tradition, where the "adherence to principles, not rules"[7] enables the application of principles to a circumstance without the need for a centralised authority to "enact amendments".[8] Aotearoa New Zealand's state legal system might be characterised as rules-based system, which is favoured by positivists, where a centralised agency creates legal rules against which one can apply a set of facts to determine whether the rules apply or not. There has been significant Western jurisprudence arguing that law can only derive from a centralised or institutionalised system.[9] There is significant Māori jurisprudence, however, showing how a de-centralised, values-based legal tradition is sufficiently certain that it can be said to create law.[10] Māori jurisprudence confirms that tikanga

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[3] Frederick Schauer "The Social Construction of the Concept of Law: A Reply to Julie Dickson" (2005) 25 Oxford Journal of Legal Studies 493 at 496.

[4] Moana Jackson "Justice and Political Power: Reasserting Māori Legal Processes" in Kayleen M Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Ashgate Publishing, England, 1995) 243 at 245.

[5] Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (University of British Columbia Pres, Vancouver, 2016) at 5.

[6] ET Durie "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 OLR 449 at 452.

[7] New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (SP9 New Zealand Law Commission 2001) at 3.

[8] At 3.

[9] See John Austin *The Province of Jurisprudence Determined* (John Murray, London, 1832); HLA Hart *The Concept of Law* (Clarendon Press, Oxford, 1961); A V Dicey *An Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, London, 1960); and Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999). For a New Zealand critique of these views, see also Karen Grau "Parliamentary Sovereignty: New Zealand – New Millennium" [2002] VUWLR 12; John Dawson "The Resistance of the New Zealand Legal System to Recognition of Māori Customary Law" (2008) 12 J S Pac Law 56; and Jackson, above n 4.

[10] See Claire Charters "Recognition of Tikanga Māori and the Constitutional Myth of Monolegalism" (SSRN Electronic Journal, 2019 <https://ssrn.com/abstract=3316400, 2019>; Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2015) 1 NZLR 1; Jones, above n 5; Durie, above n 6; Jackson, above n 1; Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2016).

Māori, a de-centralised values-based system, has the necessary characteristics to be considered a legal tradition. This debate over whether tikanga Māori has the necessary characteristics to be considered a legal tradition only exists as a consequence of the colonisation of Aotearoa. I will now provide an overview of the origins of that debate and how Indigenous jurisprudence has critiqued Western legal theory on this matter.

II. Some Historical Observations

This thesis is premised on the existence and relevance of Māori law in contemporary Aotearoa New Zealand. This assertion is only necessary because of historical and contemporary denial of the legitimacy of Māori political sovereignty and legal authority resulting from the colonisation of Aotearoa by the British in the early 19th century. But for the colonisation of Aotearoa (by any potential colonising power), Māori law would still be the dominant legal tradition of a modern independent Māori state. It is necessary then to briefly return to the origins of the colonisation process and how colonisation impacted tikanga Māori and therefore Māori law.

A. Doctrine of Discovery

Indigenous legal scholars have undertaken robust critiques of the origin of the Western colonial view of Indigenous law. Moana Jackson has described how the early Western view of Indigenous peoples, derived from Greek and Christian doctrines, was that they were of "lesser human status".[11] The 15th-century paternal view of native peoples as "infants"[12] was used to justify the colonisation of Indigenous lands, the destruction of Indigenous cultures, and the often genocidal policies directed at Indigenous peoples.[13] In the 18th and 19th centuries, this view led to the development of legal instruments that recognised limited Indigenous political and legal rights as part of the colonial political and military annexation of Indigenous lands.

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[11] Moana Jackson "The Face behind the Law: The United Nations and the Rights of Indigenous Peoples" (2005) 82 Yearbook of New Zealand Jurisprudence 10 at 12.

[12] At 12.

[13] Margaret Mutu "'To Honour the Treaty, We Must First Settle Colonisation' (Moana Jackson 2015): The Long Road from Colonial Devastation to Balance, Peace and Harmony" (2019) 49 Journal of the Royal Society of New Zealand 4 at 6.

The doctrine of Discovery was the primary legal instrument developed for this purpose. The doctrine of Discovery, utilised in English colonial law and confirmed in 1823 in the United States in *Johnson v M'Intosh*,[14] is an instrument of international law that holds that a Christian, European nation would automatically acquire sovereignty and property rights over a newly 'discovered' land that was occupied by non-Christian, non-European Indigenous peoples.[15] The doctrine was asserted against the claims of other European countries seeking the same and without either the knowledge or consent of the Indigenous owners.[16] The European property right inherent in the doctrine was technically contingent on the rights of the Indigenous owners to use and occupy the land for as long as they choose, known as the principle of continuity, and subject only to the European colonial rights of pre-emption.[17] Pre-emption rights meant that the doctrine-claiming European government had the sole right to purchase land from the Indigenous owners.

The doctrine of aboriginal or native title was a practical application of the principle of continuity, derived from the doctrine of Discovery. Native title is a lesser form of ownership exclusively applied to colonised Indigenous peoples, where:[18]

> the colonisers' law placed an obligation on colonising states to protect Aboriginal title in the land that they [Indigenous peoples] had held since time immemorial, the title itself was subject to the newly assumed and naturally superior power of the colonisers. They [the colonisers] could extinguish it (through the proper channels), they could determine what it was, and they could demand that the aboriginals proved that they had in fact had it since time immemorial.

Native title was, and remains, an intentional degradation of Indigenous legal and political authority, as it enables the colonising states to define how Indigenous rights over natural resources and societal controls will be recognised by the state. At the same time, the process of determining native title means that the ultimate authority to determine the legitimacy and scope of the rights, and the power to remove those rights, remains with the state.[19]

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[14] *Johnson v M'Intosh* 21 US (8Wheat) 543 (1823).

[15] Robert J Miller and others *Discovering Indigenous Lands* (Oxford University Press, New York, 2010) at 3.

[16] At 4.

[17] At 11.

[18] Jackson, above n 11, at 13.

[19] For a full discussion of the application of native title in contemporary New Zealand law, see Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005).

Contemporary critique of these legal tools continues from Māori legal scholars.[20] Jacinta Ruru writes that "components of Discovery continue to haunt legal and political reasoning" despite improvements in reconciliation initiatives by successive New Zealand governments and the courts.[21] While the courts have recognised the validity of native title, that recognition remains predicated on the doctrine of Discovery to legitimise Crown sovereignty over Aotearoa New Zealand. Ruru affirms that the Doctrine remains alive and well in Aotearoa New Zealand.[22] The assumption of Western political and legal superiority through both the doctrine of Discovery and the application of native title is the background for the historical and contemporary denial of Indigenous political sovereignty and, therefore, Indigenous legal authority.

B. Colonial Understandings of Māori Law

The denial of Indigenous political sovereignty necessitates a denial of Indigenous legal structures. If, as the doctrine of Discovery asserts, Indigenous peoples have no authoritative political structures (whether centralised or de-centralised), then they can have no system for determining, applying or enforcing law. The early colonial government conceptions of Māori law in Aotearoa New Zealand were premised on this assumption with, as discussed above, some concessions made to native title. This created a period of dispute about whether, as defined by English law, Māori had sufficient standing to be said to have a native or customary law that could be recognised by the state and the courts.

The New Zealand Law Commission has set out this history in detail in their seminal work from 2001 *Māori Custom and Values in New Zealand*.[23] At the time of the signing of Te Tiriti o Waitangi in 1840, Governor Hobson said that Māori have "customs … with usages having the

[20] See Jackson, above n 11; Mutu, above n 13; Ani Mikaere "Cultural Invasion Continued: The Ongoing Colonisation of Tikanga Maori" (2005) 8.2 Yearbook of New Zealand Jurisprudence 134; and Tina Ngata *Kia Mau – Resisting Colonial Fictions* (Rebel Press, Wellington, 2019). For a contemporary Pākehā analysis, see George Fitzgerald and Stephen Young "Agony, Exclusion and Colonial Reproduction: A Critical Examination of the Doctrine of Difference in Aotearoa New Zealand" (2020) 29 NZULR 313.

[21] Jacinta Ruru "Asserting the Doctrine of Discovery in Aotearoa New Zealand: 1840–1960s" in Miller and others, above n 15, at 228.

[22] At 246.

[23] New Zealand Law Commission, above n 7.

character and authority of law.[24] Within a decade or so the concept of Māori custom law was included in legislation by section 71 of the Constitution Act 1852,[25] which read in part:[26]

> [T]he Laws, Customs, and Usages of the aboriginal or native Inhabitants of New Zealand, so far as they are not repugnant to the general Principles of Humanity, should for the present be maintained for the Government of themselves, in all their Relations to and Dealings with each other.

But despite the presumption of continuity in English common law and legislative recognition of Māori customary rights, in later years the New Zealand judiciary was mostly loath to uphold the existence of Māori custom law, choosing instead to argue that the common law could not recognise 'savage' or 'uncivilised' people.[27] This attitude was most infamously restated by Prendergast CJ in *Wi Parata v Bishop of Wellington*,[28] where the court held that there is no Māori customary law that can be recognised by the courts. That judgment has since been overturned and discredited as poor law.[29] Times have changed. In the 21st century we can see the courts restating that tikanga Māori was the first law of Aotearoa[30] and the judiciary is actively looking for new ways to consider tikanga Māori and Māori law within the state legal system.[31]

Still, it is fair to say that Māori law has taken a battering by the English common law and New Zealand state law. Prior to colonisation, Māori law was the only law applicable in this country – the first law of Aotearoa. The process of colonisation caused significant harm to the operation of Māori law and undermined the intellectual and cultural tradition that built and maintained that law. I will now consider contemporary understanding of Māori law and how the Māori

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[24] Jacinta Ruru and others *Inspiring National Indigenous Legal Education for Aotearoa New Zealand's Bachelor of Laws Degree* (Michael and Suzanne Borrin Foundation, Wellington, 2020) at 28.

[25] For a fuller discussion, see Joseph *The Government of Themselves: Case Law Policy and Section 71 of the New Zealand Constitution Act 1852* (Te Mātāhauariki Institute, Waikato, 2002).

[26] New Zealand Law Commission, above n 7, at 11.

[27] At 11.

[28] *Wi Parata v Bishop of Wellington* [1877] 3 Jur (NS) 72.

[29] See *New Zealand Maori Council v Attorney-General* CA 54/87 [1987] NZCA 60; [1987] 1 NZLR 641; *Ngāti Apa v Attorney-General* [2003] NZCA 117; [2003] 3 NZLR 643; and New Zealand Law Commission, above n 7, at 13.

[30] *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board* [2021] NZHC 291 at [2].

[31] See pages 18-19 in this thesis for a discussion on recent court statements on tikanga Māori within the state legal system.

legal intellectual and cultural tradition is re-establishing the authority of Māori law in Aotearoa New Zealand.

III. Contemporary Understanding of Māori Law

Māori law has been termed "Māori custom law" in Western legal writings as a description of customs that are not derived from a central law-making authority, such as a parliament or court. Māori custom law, in its narrow sense therefore, has meant those Indigenous laws that have met specific tests of validity according to the English common law.[32] In the broader sense it means the "body of rules" that Indigenous peoples use to govern themselves.[33] Ani Mikaere,[34] Jackson[35] and Linda Te Aho[36] remind us that kupu | words like 'custom' are Western legal theorists' kupu, so have at best limited utility in describing tikanga Māori and its full legal implications. But until the time comes when we no longer have to justify the legitimacy, let alone the existence of Māori law, we do need to engage with Western language attribution and legal philosophy to some degree, if only to put it to bed. Indigenous legal scholars have engaged directly with Western language attribution and critiqued those Western legal theories that undermine the legitimacy of Indigenous law.

A. An Indigenous Critique of Positivism

The possibility that a de-centralised legal tradition can create fully functional law runs contrary to the popular positivist legal theory that has dominated Aotearoa New Zealand's legal jurisprudence.[37] The legal positivist[38] holds that centralised state institutions are the sole creators and determiners of law. Law is considered as a "product of authoritative state

[32] New Zealand Law Commission, above n 7, at 1.

[33] At 1.

[34] Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 330 at 344.

[35] Jackson, above n 1.

[36] Linda Te Aho "Tikanga Māori, Historical Context and the Interface with Pākehā Law in Aotearoa/New Zealand" (2007) 10 Yearbook of New Zealand Jurisprudence 10 at 10.

[37] Dawson, above n 9, at 60.

[38] See HLA Hart and A V Dicey, above n 9 for further discussion.

institutions: e.g., the legislation of Parliament and the rulings of the courts, in New Zealand's case".[39] These institutions are believed to be certain and authoritative and to create clear and accessible rules. This is a theory of law adopted by other colonising states, and it has given the holders of political and legal power in those states the licence to deny the legitimacy of Indigenous law because of its de-centralised origin.[40]

Indigenous legal scholars have directly challenged this culturally bound perspective of Indigenous law. Val Napoleon is a leading Indigenous jurist who writes, teaches and researches extensively on Indigenous legal traditions and Indigenous law. She is Saulteau First Nation and an adopted member of the Gitanyow (Gitksan) House of Luuxhon, Ganada (Frog) Clan. She is the Law Foundation Chair of Indigenous Justice and Governance and Director of the Joint Degree Program in Canadian Common Law and Indigenous Legal Orders (JD/JID). Napoleon has specialised in Indigenous legal research methodologies, self-determination and governance and works in research partnerships with Indigenous communities across Canada. Her doctoral thesis detailed Gitksan conflict management processes "within a substantive and critical articulation of Gitksan laws and legal practices, legal order, and legal theory"[41] and is a comprehensive study of a "complex, decentralised, non-state" society.[42] She upholds the mana of Indigenous peoples and their intellectual traditions while also engaging rigorously in Western jurisprudence debates.

Napoleon has been careful to treat Western legal theory, such as positivism, seriously but critically in her writing on Gitxsan law.[43] Her doctoral thesis essentially mapped the jurisprudence of Gitxsan legal theory, legal traditions and law both historically and in contemporary times. The Gitxsan are Pacific Northwest Coast peoples from the Tsimshian heritage and from the area now named British Columbia. In her analysis of the way in which Western legal theory, particularly that of HLA Hart, has characterised Indigenous law, Napoleon deliberately sets aside Hart's more culturally bound and "alleged imperialist"[44] notions of state-centred legislative ultimate authority in her attempt to open the analysis of

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[39] Dawson, above n 9, at 60.

[40] New Zealand Law Commission, above n 7, at 18.

[41] Val Napoleon "Ayook: Gitsan Legal Order, Law and Legal Theory" (PhD Thesis, University of Victoria, 2001 at iv.

[42] At iii.

[43] At 245.

[44] At 253.

Gitxsan law to western legal theoretical assessment. Despite some concerns from Indigenous jurists that Western legal theory is fundamentally ethnocentric and inadequate to analyse Indigenous law,[45] she justifies her use of, for example, Hart's rules on the grounds that, valid or not, positivist thinking is a central and pervasive tool in Western law to assess legal validity.

In brief, Hart advocated for a positivist, state-based concept of law where law is authoritative only where it is sourced from authoritative, centralised institutions, such as courts and a parliament.[46] His concept of law did not rely on law being moral for its legitimacy. He argued instead that the validity of law could be tested by the application of primary rules which forbid or permit actions or create obligations or responsibilities, and secondary rules which concern the process for making primary rules.[47] There are three secondary rules. The rule of recognition provides the structure or hierarchy for determining whether a pronouncement is a valid law or not. The rule of change concerns the legal process for changing law, and the rule of adjudication concerns the legal process for determining whether a rule is broken or not.

Napoleon, despite demonstrating Hart's "narrow"[48] understanding of law, nevertheless applies his rules to Gitxsan law, which she assesses as falling within Hart's legitimacy criteria of primary and secondary rules. She finds that Gitxsan law does meet Hart's criteria for primary rules of obligation and secondary rules of recognition, change, and adjudication. Gitxsan law has rules and processes to deal with those rules.[49] Napoleon's analysis of Gitxsan law, and Indigenous legal traditions more generally, is built from a confident view of the legitimacy of Indigenous law. She demonstrates that Indigenous legal traditions stand up well to any intellectual analysis of the concept of law, once prejudiced assumptions are removed from the more fundamental intellectual argument on what might constitute law.

B. Tikanga Māori and Hart's Rules

Mamari Stephens takes a similar approach in her assessment of tikanga Māori against Hart's criteria for primitive pre-legal systems.[50] The values of tikanga Māori are articulated at a high

[45] At 248.

[46] Dawson, above n 9, at 60.

[47] Hart, above n 9, at 96.

[48] Napoleon, above n 41, at 253.

[49] At 253–254.

[50] Mamari Stephens "Māori Law and Hart: A Brief Analysis" (2001) 32 VUWLR 853.

level, but flow down into principles and practices that can indeed be called law. In contrast to positivist law, however, tikanga emerges from the community, not from a central body responsible for issuing authoritative determinations.

One of Hart's propositions is that if a society only uses primary rules – rules that forbid or permit actions or those that create obligations or responsibilities – but does not have secondary rules for making, changing and adjudicating primary rules, then that society can be described as "prelegal" or "primitive".[51] Like Napoleon in her analysis of Hart and Gitxsan law, Stephens suggests that Hart's notion of primitive law is a straw man or a mirage, secondary to Hart's more substantive theoretical contribution to Western jurisprudence. She argues that Hart's description of primitive, prelegal societies as uncertain, static and inefficient is unnecessary and unjustified. She contrasts Hart's critique of prelegal societies as uncertain against his critique of those same societies as suffering from stasis. She finds an inherent inconsistency in that such societies are deemed by his theory to be primitive because they are at once static, traditional and rigid while also being open to change and flexible as circumstances require.[52]

Again like Napoleon in her study of Gitxsan law, Stephens finds that tikanga Māori does meet Hart's criteria for primary and secondary rules.[53] For example, in relation to the rule of recognition which specifies "the characteristics needed by a particular rule to be generally obeyed".[54] Stephens argues that tikanga Māori provides those characteristics because actions or rules are "judged by their compatibility with tikanga".[55] Tikanga provides both the principles for the assessment of an action as well as the content of the action itself. In Chapter 5 I will provide more detail as to how the principles of tikanga create binding legal responsibilities against which specific actions can be judged and adjudicated. Needless to say, I agree with Stephens' assessment that tikanga Māori generally, and its principles specifically, meet Hart's rule of recognition.

Hart's rule of change is also discussed by Stephens. In describing prelegal societies, Hart assumes that such societies have no system for introducing new rules and changing existing

[51] At 854.

[52] At 860.

[53] At 862–863.

[54] At 856.

[55] At 858.

rules. In my view this is critique by Hart is a necessary consequence of his monotheistic view that law can only be derived from an authoritative central source. That assumption would, in most cases, rule out any society or culture structured in a de-centralised way. Stephens addresses this with her analysis of the role of hui:[56]

> If legislation is merely the collective enactment of laws, then Māori in hui enact legislation and change and adapt those laws as necessary, providing such laws are valid according to tikanga. Certainly, Māori did not consider themselves bound by a static set of customs; they were fully able to change the rules by which they were bound, with only the condition that tikanga be maintained.

Similarly, Stephen's says that Hart's rule of adjudication is easily met. She refers to the recorded resolution of breaches of tikanga through the recognition of tapu | sacred and the expertise of tohunga in adjudicating those breaches. Stephens, citing Tā Apirana Ngata, says "[t]he law that governed the tribe practically emanated from the priest, from the tohunga"[57] and that the function of tohunga and other rangatira | chiefs was to identify when a breach of tapu had occurred and the consequences of that breach.[58]

While some people might still ask whether a Māori jurist is talking about 'lore' or 'law', Indigenous legal theorists seem to be increasingly of the view that this question is a product of a time when there was less advocacy of the legitimacy of Indigenous law and too few Indigenous legal scholars to set out the arguments. Thankfully that time is passing.

C. An Inclusive Definition of Law

Richard Benton, Alex Frame and Paul Meredith consider the question of whether Māori custom is law or not in their introduction of definitions in *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law*.[59] Their starting point is Western legal theorists' views of customary law, which distinguishes between those customs that act as a habit or fashion and those customs that give rise to an obligation or a right that is

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[56] At 861.

[57] Tā Apirana Ngata Debate on the Tohunga Suppression Bill [1907] 139 NZPD 518, as cited in Stephens at 862, n 50.

[58] At 863.

[59] Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 13.

generally accepted and recognised by the community.[60] Benton, Frame and Meredith favour E Adamson Hoebel's definition of law:[61]

> [A] social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual, group, or agency possessing the socially recognised privilege of so acting.

Hoebel's definition provides a wide interpretation that avoids the culturally bound notion that law is only sourced from a centralised agency, for example a parliament, as suggested by positivists.[62] Benton, Frame and Meredith's discussion of Hoebel's definition centres on the extent to which physical force or coercion is a necessary precondition for law and, if so, what the nature of that force or coercion would be within te ao Māori. Utilising the legal expertise of some of the intellectual giants of te ao Māori,[63] they develop a definition of Māori customary law that modifies Hoebel's definition.[64] They determine that use of the kupu | word 'force' by Hoebel could include 'social pressure' created by the reciprocal nature of Māori social relationships within te ao Māori. The authors also suggest that the "recognition and reinforcement of 'supernatural' consequences" creates a social pressure equivalent to that of physical force.[65] Presumably by 'supernatural' they are referring to the principle of tapu | sacred and the range of impacts a breach of tapu might have on a person's or group's mauri | life principle and ihi | psychic force. Regardless, by rightly sourcing the notion of force within te ao Māori, Benton, Frame and Meredith dispense with the centrist restrictions of many Western legal theorists. They therefore resolve the question of whether Māori customary law is law with the following definition:[66]

> A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of force or *the construction of serious social disadvantage* by an

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[60] At 13.

[61] E Adamson Hoebel *The Law of Primitive Man: A Study of Comparative Legal Dynamics* (Harvard University Press, Cambridge, MA, 1954) as cited in Benton, Frame and Meredith at 14, n 59.

[62] See Hart, above n 9.

[63] Judge Michael Brown, Sir ET Durie, Manuka Henare, Tui Adams, and Denese Henare were on the Te Mātāhauariki Advisory Board, and contributions to the scholarship were also made by Bishop Manuhuia Bennett, Dr Paki Harrison, Tā John Turei, and Hirini Melbourne, among others.

[64] Benton, Frame and Meredith, above n 59, at 13.

[65] At 14.

[66] At 16. My emphasis.

> individual, group, or agency possessing the socially recognised privilege of so acting.

This definition provides a useful way to discuss the legitimacy of Māori law within a Western jurisprudence context. This definition does not concede to narrow interpretations of the nature of law or of its source. Neither does it lean on easy and prejudiced views about the use of violence by Indigenous peoples to enforce rules. The definition enables Western and Māori legal theorists to engage in a more principled discussion about the nature of two different but equitable legal systems/traditions and how those legal systems/traditions might operate together and differently within a pluralist legal society.

The revised Hoebel's definition is not a Māori or Indigenous definition of law, however. It is a more inclusive Western legal definition of law. It must be remembered that the Māori perspective of Māori law ought to take precedence when undertaking scholarship within a Kaupapa Māori research process. I have provided this background on the historical and contemporary understanding of Māori law by Western legal theorists to provide some context for this thesis. I have shown how Indigenous legal theory is developing within its own frameworks despite historically exclusionary Western legal theories. I have described in brief how Stephens has assessed Māori law as meeting Hart's rules and how Indigenous legal theorists are framing Indigenous law in Indigenous jurisprudence, utilising both Indigenous and Western legal theories as they deem appropriate. I will now use both Val Napoleon's and Carwyn Jones' categorisations of Indigenous law to define the Māori legal order, the Māori legal tradition, and Māori legal systems.

IV. Defining Māori Law

Indigenous legal theorists are utilising traditional and contemporary Indigenous intellectual traditions to identify, define, and frame new scholarship on Indigenous legal traditions and law. I have chosen to focus on the work of Indigenous legal scholars, such as Val Napoleon, Carwyn Jones, Tā Hirini Moko Mead and Paul Meredith, for their expertise in applying the Indigenous and the Western intellectual traditions to an understanding of Indigenous law. By privileging Indigenous theorists in this thesis, even where I might disagree with them, I hope to continue the Indigenous intellectual tradition of robust debate on the nature of Indigenous polity and legal traditions.

A. Val Napoleon's 'Legal Tradition' and 'Legal Order'

Val Napoleon deploys the idea of a 'legal tradition' to help distinguish between de-centralised Indigenous law and state law. Certain legal traditions are based on a centralised state legal system, such as those of Aotearoa New Zealand or Canada. Napoleon describes these as 'legal systems'. Other legal traditions are based on a kin-based, de-centralised concept of law. Napoleon calls on John Henry Merryman's broad definition of legal tradition to set the parameters for understanding what an Indigenous legal tradition is. Merryman defines a legal tradition as:[67]

> a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the ways law is or should be made, applied, studied, perfected, and taught.

Napoleon says a legal tradition includes implicit and explicit law, the collective legal reasoning process, legal relationships, institutions, and venues of law and legal practice.[68] Further, Napoleon describes law as not just a set of predetermined rules but as the intellectual process of 'deliberating and reasoning'[69] on how any rules should be applied in any given context. This is the exercise of the law in a practical and principled form.

I would argue that a legal tradition also includes performative legal acts, and encoded objects used by those people to store and transmit legal information. If, as Napoleon says, "law is something that people actually do",[70] then the process of law and legal reasoning requires both intellectual consideration and physical engagements that are activated by the body. These engagements include speaking, singing, moving, writing, carving, and object-making as performative legal acts utilising mnemonic objects to aid memory and encoded objects as documentation.

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[67] John Henry Merryman *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd ed, Stanford University Press, Stanford, CA, 2007) at 1.

[68] Val Napoleon "Thinking about Indigenous Legal Orders" (paper prepared for the National Centre for First Nations Governance, 2007) at 2.

[69] At 4.

[70] Napoleon, above n 68, at 4.

In Aotearoa New Zealand's state legal system we can identify affectations of the court as performative legal acts, such as standing for the judge when they enter or leave the courtroom, verbalising a promise or oath to speak truthfully, and the wearing of gowns and wigs to denote status and legal authority. We can identify encoded objects such as stamps and specified paper forms which are used to document and legitimise legal statements made in a court room. New Zealand lawyers can only legally practise law if they are 'admitted to the bar'. That 'bar' is conceptualised as physical division of the courtroom space which only a selected few may cross. In fact, that 'bar' is at best a small indoor gate, and most often in modern courtrooms it is a simple handrail. The physical bar itself is an encoded object as a legal sign or notional barrier creating a 'sacred' or 'taboo' space into which only specially legally anointed individuals are entitled to enter. The New Zealand state legal system uses performative acts and encoded objects to enable the legal system to be understood and applied within the cultural context in which its laws are made. The Māori legal tradition might also include performative acts, as suggested by Frame and Meredith,[71] mnemonic devices, and encoded objects to ensure the legal tradition can be understood and applied within the cultural context in which its laws are made.

Napoleon uses the term 'legal order' to describe how Indigenous law is understood within the "social, political, economic, and spiritual institutions"[72] of the culture that creates it. She argues that law is culturally bound to the specific institutions of the culture in question, by which she means institutions in the broader sense of organisations, conventional knowledge, regularised practices, customary rules, and practices of an Indigenous culture. This means that different societies can derive from the same legal tradition, but they may have different legal orders arising from how they have chosen to regulate their legal relationships in their world.[73] Napoleon uses the example of the different legal orders of Gitksan, Cree and Dunnezah peoples, which could be considered to belong to the same legal tradition.[74] One could argue the same for the United Kingdom, Australia and New Zealand, whose legal systems have their origin in the Westminster parliamentary system but which nonetheless differ in material ways.

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[71] Alex Frame and Paul Meredith "Performance and Maori Customary Legal Process" (2005) 114(2) Journal of the Polynesian Society 135 at 135.

[72] Napoleon, above n 68, at 2.

[73] At 2.

[74] At 2.

To clarify, as described by Napoleon, a *legal system* refers to a centralised state legal system. A *legal tradition*, by contrast, refers to de-centralised, kin-based non-state Indigenous law. The legal tradition includes implicit and explicit law, the collective legal reasoning process, legal relationships, institutions, and venues of law and legal practice. A *legal order* describes the law that is created by the distinct social, political, economic and spiritual institutions of the society.

B. Carwyn Jones's 'Māori Legal Tradition' and 'Māori Legal Order'

Carwyn Jones, Ngāti Kahungunu ki Wairoa and Te Aitanga-a-Māhaki, is an Associate Professor at the School of Law, Victoria University of Wellington. He has worked at the Waitangi Tribunal, Māori Land Court, and with the Office of Treaty Settlements. His research specialties include Te Tiriti o Waitangi, Treaty settlement law, Māori law and constitutional law. In his book *New Treaty, New Tradition*[75] on the interaction of New Zealand state law and Māori law, Jones used pūrākau | story as a narrative tool to describe and "reinforce the social, cultural and political contexts of law".[76] Storytelling is a core means by which Indigenous peoples transmit legal information across place and time. Jones's research looked at the ways in which the dynamic legal culture of tikanga Māori has flexed in response to the government-led process for the settlement of historical claims against the state.[77]

Jones examines the nature of Māori legal traditions and takes a slightly different approach from Napoleon in applying the definitions of legal tradition and legal order to te ao Māori.[78] Whereas Napoleon looks to Merryman as the basis for her definition of legal tradition, Jones looks to Harold Berman's *Law and Revolution*[79] to consider legal traditions within a pluralistic society.[80] Berman argues that coexistence and competition with other legal systems and traditions is a feature of the Western legal tradition. Jones also refers to Patrick Glenn's view of legal traditions as "a means of capturing information from the past in a way that is meaningful for the present".[81] For Jones, Berman and Glenn's terminology enables Jones to

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[75] Jones, above n 5.

[76] At ix.

[77] At 5.

[78] At 23–24.

[79] Harold J Berman *Law and Revolution* (Harvard University Press, Cambridge, MA, 1983).

[80] Jones, above n 5, at 24.

[81] Patrick Glenn *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press, Oxford 2007) at 24, in Jones, above n 5, at 24.

use the kupu ‘tradition’ to describe Māori legal traditions as both sourced in historical practices but also as dynamic and capable of change to meet new circumstances. Jones describes this as using the kupu ‘tradition’ to unite ancestral understandings of law with contemporary understandings of law.[82]

Jones considers whether tikanga Māori could be described as a legal tradition and concludes that tikanga Māori is in fact more than a legal tradition. He says that tikanga encompasses Māori law but that it also includes ritual, custom, and spiritual and socio-political dimensions that go well beyond the legal domain.[83] He then describes the *Māori legal tradition* as the aspect of tikanga that has a legal quality, including Māori legal practice, principles, processes, procedures, and Māori legal knowledge. Jones considers that a legal tradition is underpinned by a set of values that reinforces the “interconnectedness of all living things” where whakapapa | genealogy is the “organising principle” of te ao Māori.[84] A *Māori legal order* then is the fundamental values, institutions and philosophical perspectives that underlie all Māori legal systems. I have summarised how Jones and Napoleon respectively define legal tradition and legal order in the figure below.

	Napoleon	**Jones**
Legal tradition	A de-centralised non-state Indigenous law that includes implicit and explicit law, the collective legal reasoning process, legal relationships, institutions and venues of law and legal practice.	The aspect of tikanga that has a legal quality, including Māori legal practice, principles, processes, procedures, and Māori legal knowledge.
Legal order	The distinct social, political, economic and spiritual institutions of the society that create law.	The fundamental values, institutions and philosophical perspectives that underlie all Māori legal systems.

Figure 1 Napoleon’s and Jones’s definitions of ‘legal tradition and ‘legal order’

Jones also defines *Māori legal systems.* He uses the plural “systems” to describe those iwi legal systems that derive from the Māori legal tradition and how those systems of law are

[82] At 24.

[83] At 23.

[84] At 38.

exercised differently by iwi according to their own kawa | customs.[85] These iwi differences are important and could be explored more. However, for the purposes of this thesis, I will take a broad te ao Māori approach, in deference to the comment of Tā Durie that "there is as much a Māori law as there is a Māori language".[86] I understand Tā Durie to mean that there is a broad understanding across te ao Māori of the general principles of Māori law, even where there are some 'dialectal' differences among iwi.

I do not need to choose between the analyses of Napoleon and Jones for this thesis. Both analyses are useful for different parts of my argument. First, I will apply Napoleon's use of the broad definition of 'legal tradition' to describe de-centralised Indigenous law in general. It is a definition that privileges the culture in which the particular law is developed and recognises that different societies will have law even where the structure and content of that law may be opaque to outsiders. That approach follows a kaupapa Māori research practice. Then, I will use Jones's definition of Māori legal tradition to describe the body of principle, derived from tikanga Māori that have a legal quality. I use 'Māori law' to describe the practices and tools that give effect to the principles of the Māori legal tradition.

Jones's definition enables me to allocate appropriate language to the structure of tikanga Māori and Māori law. This makes it possible to unpick how a set of values in a de-centralised culture can also be understood as the principles of law within that culture. These principles of law are the basis for "social, political, economic, and spiritual institutions"[87] that create the law and govern how it is exercised. How the law is exercised is an essential character of a legal tradition, as both Napoleon and Jones have described in their research.

To conclude this analysis of law as understood by Western and Indigenous jurists, I will now review an important piece of work entitled "Performance and Māori Customary Legal Process"[88] by Alex Frame and Paul Meredith. This article argues that Māori law was largely performative in nature because Māori society has an oral rather than written tradition. As such, it provided great impetus for this thesis and demonstrates a deepening of the scholarship inquiry into what Māori law is and, importantly, how it operates. I do not agree with the authors'

[85] At 24.

[86] Durie, above n 6, at 451.

[87] Napoleon, above n 68, at 2.

[88] Frame and Meredith, above n 71.

conclusions, but the article does provide a new way to consider essential aspects of the Māori legal tradition and opens a discussion on the documentation of Māori law.

C. Oral Culture, Performative Culture

When the authors of *Te Mātāpunenga*[89] were undertaking the research for their seminal book, they sought out the 'instruments' of Māori law – the physical embodiments of Māori law. A written alphabet was not a technology used by te ao Māori prior to colonisation, and therefore Frame and Meredith were looking for the equivalent and appropriate comparison between the written instruments of English law and the performative instruments of Māori law. They relied heavily on Bernard J Hibbitts's analysis of law in what he calls "performative cultures" in an effort to describe the media by which law is communicated in non-written cultures, but in a way that dispenses with the "conceptual inadequacy" of the phrase "oral culture".[90]

Frame and Meredith, in accepting Hibbitts's framing and categorisation of performative culture posit that Māori legal concepts will not be written so therefore its instruments must be performative. There are four characteristics of performed law in oral cultures according to Hibbitts, which Frame and Meredith reiterate:[91]

> It is personal: Without the performer, there is no performance. Information cannot exist independent of the status or reputation of the human individual presenting it.
>
> It is social: Communicative success depends on the live performer actually appearing before a live audience … Individuals in performance-based societies become so accustomed to and dependent upon contact with one another that they tend to conceive of the very idea of "self" in social terms, identifying themselves primarily by their social relationships and the opinion that others have of them.
>
> It is dynamic: The dynamism of performance is arguably reflected in the performative inclination to think of law not as things but as acts, not as rules or agreements, but as processes constituting rule or agreement. A performative contract, for instance, is not an object but a routine of words and gestures …

[89] Benton, Frame and Meredith, above n 59.

[90] Bernard J Hibbitts "'Coming to Our Senses': Communication and Legal Expression in Performance Cultures" (1992) 41 Emory Law J 873 at 879.

[91] Frame and Meredith, above n 71, at 136.

> Likewise, members of performance cultures tend to think of justice not as something that simply is, but rather as something that is done.
>
> It is ephemeral: … the ephemerality of performance encourages members of performance cultures to organise and orchestrate performance to maximise memorability and minimise the likelihood of change."

These performative characteristics could also be applied to state legal systems, and this is acknowledged by Hibbitts's,[92] but for the purposes of understanding how law is documented, state legal systems also use writing. Almost all the examples Frame and Meredith use in their article to demonstrate Māori law as performative law relate specifically to the use of the spoken kupu | word and physical gestures. Those examples include kawa | customs, waiata kākahu | protective song, ka tika tō mate | symbolic violence, ohākī | a performed will, and rongo-a-whare | women as emissaries. The authors clearly identify the legal content of those performative legal acts, providing a model for understanding these legal activities within the legal framework of te ao Māori. This aspect of the article was instructive for developing my approach in this thesis, and I am grateful for their analysis of Māori law. But while Frame and Meredith do also note the use of objects in the process of the performance of legal acts, it is here where my analysis diverges from theirs.

I suggest that they have underestimated the legal value of encoded objects in their search for evidence of the performative instruments of Māori law. By focusing on performance as the primary component of the "customary repertoire as the instrument of legal transactions and as analogous to the written documents of legal systems reliant upon the written word",[93] they tend to relegate objects to 'props' of the performance rather than as documentation in their own right.

One example where they tend towards a 'props' analysis is in their discussion on "tapae toto".[94] Tapae toto are blood gifts,[95] very highly valued taonga gifted to confirm permanent arrangements such as the permanent transfer of land. By the naming of the koha | gift as 'tapae toto' the taonga becomes a binding contract between the parties. Frame and Meredith note this, heading this section of their article as "Taonga as Contracts". They give three

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[92] Hibbitts, above n 90, at 895.

[93] Frame and Meredith, above n 71, at 137.

[94] At 148.

[95] Benton, Frame and Meredith, above n 59, at 148.

examples of tapae toto: one with a kaitaka | mat and korowai | cloak as a commitment of loyalty to the government, one with a mere | short weapon and korowai recording a transfer of land at Kennedy Bay, and a third example of an heirloom pounamu | greenstone recording a long-term relationship with Governor Grey. In recognising the taonga as contracts, Frame and Meredith recognise objects as holding some legal authority, saying that the "presentation, and the taonga itself, thus become evidence of the relationships and rights confirmed and granted."[96]

I suggest Frame and Meredith could have expanded on this and considered more closely the physical, as well as the performative, documentation of Māori law in whakairo Māori. In the examples they describe above, the objects operate *within Māori law* as binding commitments and agreements – a 'contract', as Frame and Meredith say. That gives the objects themselves a status as a legal document, understood by both the parties as affirming an agreement. These objects could be said to be encoded objects, containing legal literacy and acting as visual records of Māori law. It is this argument that I advance and support in this thesis.

V. He Mutunga

The historical denial of the legitimacy of Māori political sovereignty and legal authority was a terrible but nonetheless intended consequence of the colonisation of Aotearoa by the British in the early 19th century. The assumption of Western legal and political superiority, the imposition of the doctrine of Discovery, and the use of legal tools like native title all interfered with Māori political and legal authority. However, the Māori polity was operating before colonisation occurred and continues, albeit in an abridged form, despite ongoing coloniality.

Indigenous legal scholars have presented and continue to present robust critiques of the Western colonial view of Indigenous law. They have critiqued Western legal theories that undermine the legitimacy of Indigenous law, using both Western and Indigenous legal theories to do so. In the process they are creating new scholarship on Indigenous legal traditions and law. The effectiveness of that robust intellectual tradition is evident in the resurgence of tikanga Māori and Māori law as a growing part of Aotearoa New Zealand's jurisprudence.

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[96] Frame and Meredith, above n 71, at 149.

This chapter is important for this thesis because it has demonstrated the depth and relevance of Māori law as an extant body of law in Aotearoa New Zealand. By clarifying that Māori law continues to operate in Aotearoa New Zealand, I can now demonstrate the different ways that it might be documented in non-written visual forms, including in whakairo Māori.

Te Wāhanga Tuatoru – Visual Literacy

> "It is through the visual images and other artistic expressions created by Indigenous peoples that law and history are 'written' – fundamentally challenging the colonialist construction of Indigenous people as living in non-literature and merely customary societies."[1]

This chapter demonstrates that there are forms of visual literacy that do not use an alphabet. Sometimes referred to as a visual language, these forms of visual literacy can communicate social, political and legal information to the reader. I show how Indigenous law can therefore be documented in different visual forms. These forms are culturally determined and connected to the way that Indigenous peoples view the world and their relationship to it, including their legal relationships to each other, with their atua | deities and with the natural world. I describe how it is necessary to understand the cultural context in which the visual mark-making is done in order to understand the legal concepts written by that visual language. This chapter provides a theoretical insight into how Māori law might be written into whakairo Māori as a visual language.

I. A Visual Culture of Mark-Making

Describing Indigenous peoples as being from 'oral cultures' is an unnecessarily simplistic description of the literary skill of Indigenous peoples.[2] The term 'oral culture' is used to distinguish between cultures with a tradition of alphabetic or pictographic writing and those without, but is often used as a shorthand to imply that oral cultures are more primitive because they do not use writing.[3] This implication significantly undervalues Indigenous peoples' visual culture of mark-making and object-making as a means of documentation and communication of social, political, and legal information. All cultures use a variety of forms of communication

[1] Chris Cunneen "Visual Power and Sovereignty: Indigenous Art and Colonialism" in Michelle Brown and Eamonn Carrabine (eds) *The Routledge International Handbook of Visual Criminology* (Routledge, New York, 2017) 376 at 382.

[2] Bernard J Hibbitts "'Coming to Our Senses': Communication and Legal Expression in Performance Cultures" (1992) 41 Emory Law Journal 873 at 879.

[3] At 877.

to express themselves, and each culture determines for itself the communication purpose and value of each of those forms.[4] I argue that literacy is a skill set identifiable in the legal tradition of te ao Māori.

I first use the education theory of multimodal literacy to explain how a culture can use different kinds of literacy to communicate information. Multimodal literacy details how cultures use multiple forms of communication in complex ways to communicate meaning, status and authority. I then explain how visual literacy, which is one aspect of multimodal literacy, is used by Indigenous peoples to document their social, political, and legal activities. To demonstrate both these theories, I draw on two contemporary examples from Aboriginal and Torres Strait Island communities which demonstrate the documentation of Indigenous law in visual art.

II. Multimodal Literacy

Multimodal literacy is where two or more modes of meaning are used in a communication.[5] Modes can include performative communication such as the spoken kupu | word or ceremonial acts of posture, gesture, or sound.[6] Modes can include visual images and any number of forms of mark-making, including writing, carving, painting and weaving. Modes can be used in any combination in the effort to communicate meaning. How a maker or culture chooses to combine modes can also communicate the status, authority and context of the communication.[7] The reading of the modes also requires knowledge of "the historical, political, commercial, or ideological position of the text producers in relation to the reader or consumer"[8] in order to fully understand the communication purpose and its authority.

Kathy Mills and Katherine Doyle describe how culture and context drive preferences for the use of different modes of literacy for different purposes.[9] Each of those modes have modal

[4] Kathy Mills and Les Unsworth "Multimodal Literacy" in George W Noblit (ed) *Oxford Research Encyclopedia of Education* (online ed, 19 December 2017) <https://doi.org/10.1093/acrefore/9780190264093.013.232> at 6.

[5] At 6.

[6] Kathy A Mills and Katherine Doyle "Visual arts: a multimodal language for Indigenous education" (2019) 33 Language and Education 521 at 522.

[7] Mills and Unsworth, above n 4, at 6.

[8] At 6.

[9] Mills and Doyle, above n 6, at 522.

grammars, which themselves communicate shared meanings in communities or cultures.[10] Whether or not a person can derive meaning from that communication depends on whether that person is literate in that mode of communication.

Jeffery G Hewitt is a Cree lawyer and Associate Professor at Osgoode Hall Law School, University of Windsor. He specialises in interdisciplinary Indigenous legal theory and the visuals of law. He provides a simple illustration of how a person literate in one particular visual mode may not be literate in another. Using the act of writing the kupu | word 'cat' in English and Greek, he says:[11]

> Translating the visual into meaning a feline mammal, is the result of acquired literacy. Write 'cat' in another language, such as Greek, and it becomes 'Γάτα'. While visually beautiful, the Greek version of 'cat' holds no meaning for my English-trained eyes. But does that deem it meaningless? It simply illustrates that I am illiterate in Greek and thereby untrained to derive abstract meaning from the visual text, as I can in English. Text as a visual medium is learnt. Translating text into meaning requires literacy, which is also an acquired skill.

Just as different written languages express ideas that can be read if one is sufficiently literate, other visual modes such as design, art, carving, tattooing, and object-making can also be read, with the requisite visual literacy. It is this kind of visual literacy that Chris Cunneen, a Professor of Criminology at University of New South Wales and specialist in Indigenous peoples and the law, is referring to when he says that it is "through the visual images and other artistic expressions created by Indigenous peoples that law and history are 'written'".[12] First Nations peoples from Canada use "pictoglyphs, wampum belts, masks, totem poles, button blankets, culturally modified environments, birch bark scrolls, burial disturbances, songs, ceremonies and stories".[13] Aboriginal and Torres Strait Islanders use "song, dance, body, rock and sand painting" to demonstrate their Indigenous law.[14] I argue that in Aotearoa, Māori use whaikōrero | oration, tā moko | tattooing, pou whenua | land marker posts, raranga | weaving, pūrākau |

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[10] At 522.

[11] Jeffery G Hewitt "Certain (Mis)conceptions Westphalian Origins, Portraiture and Wampum" in Shane Chalmers and Sundhya Pahuja (eds) *Routledge Handbook of International Law and the Humanities* (Routledge, London, 2021) at 160.

[12] Cunneen, above n 1, at 382.

[13] At 382.

[14] At 382.

stories, and waiata | songs. The modes of literacy for communicating law are culturally determined, not absent in so-called 'oral cultures'.

III. Visual Literacy

Visual literacy is a communication mode that uses visuals for communication, thinking, learning, constructing meaning, creative expression, and for aesthetic enjoyment.[15] It is a mode that communicates ideas, emotions, events: essentially, visual literacy enables the communication of culture. As people who have grown up in a literate written culture, we can understand very easily how writing, on which we are so dependent for communication, communicates culture. We place an extremely high value on the written kupu | word, and even love the written kupu for its communicative power and its ability to inform, entice, and inspire.[16] While visual art is valued for its capacity to express ideas, to elicit emotions, and to open new ways for viewing ourselves and the world, state authorities have tended to treat the written kupu as superior and Indigenous creative expressions as inferior.[17] This distinction is not necessarily true for Indigenous peoples, who, as Cunneen says, may record their law in creative works.[18]

Sheryl Farrell-Racette is a Métis writer and artist specialising in Indigenous art and Canadian art history. She says that for many Indigenous peoples objects are a form of visual literacy. Her view is that visual literacy is about not only the symbols on the surface of an object but also the "words, prayers, tears and fervent hope thus spoken into them at the moment of their creation and over their lifetime".[19] Galarrwuy Yunupingu, a senior ceremonial and community leader of the Gumatj clan of the Yolngu people says simply, "Painting is our foundation. White man calls it art."[20] Cunneen describes how Indigenous art as a communication tool is often

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[15] Maria Avgerinou and John Ericson "A Review of the Concept of Visual Literacy" (1997) 28 British Journal of Educational Technology 280 at 284.

[16] Hibbitts, above n 2, at 875.

[17] Cunneen, above n 1, at 382.

[18] At 378.

[19] Sheryl Farrell-Racette "Encoded Knowledge: Memory and Objects in Contemporary Native American Art" in *Manifestations: New Native Art Criticism* (Museum of Contemporary Native Arts, Santa Fe, NM, 2011) 40 at 52.

[20] Cunneen, above n 1, at 378. Galarrwuy Yunupingu (b 1948) holds an honorary Doctor of Laws by the University of Melbourne for his work on Indigenous rights and was the 1978 Australian of the Year. In 1985 he was made a Member of the Order of Australia for his services to the Aboriginal community.

misunderstood, and misread, by Western colonising societies. He says that Indigenous art is not just about the visual representation of social and political processes. Rather it sets out a way to understand more fundamental questions of "Indigenous law, ontology, and epistemology. Indigenous art plays a special role in understanding law in a society that did not rely on the written text."[21] Indigenous peoples' use of visual documentation is not just to describe their societies but to demonstrate entirely unique perspectives of what the society values; how its members understand the connections between the material, the social and the spiritual worlds; and how their world view is structured and represented.

Rangihīroa Panoho, Ngāpuhi and Ngāti Whātua, is an art historian with a research specialisation in whakairo Māori and its connection to te taiao | the environment. He is also a curator, painter and photographer. In his book *Māori Art, History, Architecture, Landscape and Theory*,[22] Panoho looks at the relationship between Māori artists, their whakapapa, and the whenua | land. He uses the concept of the palimpsest when describing the integrated nature of Māori art forms, te ao Māori, te taiao | the environment and whakapapa.[23]

A palimpsest is a manuscript used and reused for multiple markings over time, often but not always requiring the obscuration of the layers of marking that came before. Panoho suggests that by allowing several layers to be seen concurrently, the concept of the palimpsest is an approach that "offers the widest possible terms for considering Māori art, the kaupapa of its artists, the landscape and the history to which it belongs, and to its endless interpretations".[24] He argues that the palimpsest is a useful conceptual tool for understanding how Māori use their creative works to communicate the full cultural context of the object, whether it is a painting, carving or other creative works.

The palimpsest is also a useful analogy when considering how Māori law might be documented in whakairo Māori. If law is "something that people actually do"[25] then I suggest an important part of 'doing' a legal process is its physical activation through both the performance of law and the visual documentation of law. If Māori intended to communicate our "law, ontology, and epistemology" in visual documentation, then that documentation is a kind of palimpsest

[21] Cunneen, above n 1, at 382.

[22] Rangihīroa Panoho *Māori Art: History, Architecture, Landscape and Theory* (David Bateman, Auckland, 2015).

[23] At 30.

[24] At 30.

[25] Val Napoleon "Thinking about Indigenous Legal Orders" (paper prepared for the National Centre for First Nations Governance, 2007) at 4.

layered with a visual language, cultural meaning and purpose. That visual documentation can then be used, and read, in different ways depending on the purpose and information encoded in it, and the knowledge and intent of the person reading it.

By expanding our conception of the value and authority of non-written visual markings as containing layers of meaning, we can understand a much broader range of cultural concepts within the paradigm of the culture of the maker. I now consider two examples of Indigenous visual literacy from Aboriginal and Torres Strait Islander communities. These examples illustrate how non-written visual works form legal documentation both in state law and in Indigenous law. Both of these examples have been the subject of legal analysis in Australia and elsewhere on the use of Indigenous visual art in state legal proceedings relating to ownership of land and natural resources.[26] They represent two significant advances in state law recognition of non-written visual documentation of Indigenous law. Most importantly, however, these examples show how Indigenous peoples' express their conception of their world and their law in a visual language.

A. Saltwater Collection – Blue Mud Bay

> This water is saltwater. The waves called Rulyapa rise and crash on that rock Gilgilgilwa, Burruwawa. Hitting that rock; the water. And in that water lies our sacred Law.[27]

The Yolgnu people belong to the northeast of Arnhem Land, now part of the Northern Territory, Australia. They are formed from nine clans interconnected through two moieties.[28] In 1980, the Arnhem Land Aboriginal Land Trust, who represented the Yolgnu in their native title legal cases, were awarded two grants of fee simple title under the Aboriginal Law Rights

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[26] See generally Zia Akhtar "Aboriginal Oral Testimony, Hearsay Rule and the Reception Theory of Admissibility" (2016) 42 Commonw Law Bull 396; Kirsten Anker *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Ashgate Publishing, England, 2014); Jenny Issacs and others *Saltwater: Paintings of SeaCountry: The Recognition of Indigenous Sea Rights* (2nd ed, Baku-Larrngay Mulka Centre, Yirrkala, 2014); Howard Morphy "The Blue Mud Bay Case: Refractions through Saltwater Country" (2009) 28 Dialogue, Journal of the Academy of the Social Sciences in Australia 15; and Howard Morphy and Frances Morphy "Tasting the Waters: Discriminating Identities in the Waters of Blue Mud Bay" (2006) 11(1–2) Journal of Material Culture 67.

[27] Lanani Marika quoted in Issacs and others, above n 26, at 19.

[28] Morphy, above n 26, at 71. 'Moiety' is an anthropological term which the *Oxford English Dictionary* defines as "either of two primary social or ritual groups, usually exogamous, into which the society is divided". In this case, Blue Mud Bay covers the area of two moieties. One moiety, Yirritja, includes five clans; the other, Dhuwa, includes four clans. The moieties are closely linked by marriage, forming a kin network.

(Northern Territory) Act 1976. The two grants included 90,000 square kilometres of mainland and island lands off the coast of the Northern Territory. The titles extended to the low water mark of an extensive coastline and included the intertidal zone and an area called Blue Mud Bay.[29]

Despite the granting of native title into the intertidal zone, extensive non-Indigenous fishing continued on the Yolgnu coastline for some years without the tribe's permission. In 1996 a kaitiaki | guardian, Waka Munungurr, found an illegal barramundi fishing camp in a tapu | sacred area called Garranali. Garranali is the home of Bäru, an atua | deity in human and crocodile form. The Madarrpa clan, who are kaitiaki of that area, whakapapa to that atua.[30] At the illegal camp, Munungurr found a bag containing the severed head of a crocodile.[31] This desecration of Bäru sparked a ground-breaking legal case on whether the Yolgnu people had the right to exclude fishers from the intertidal zones and waters within their title boundaries even where those people may be permitted to fish there by state fishing legislation. The Yolgnu eventually won their case in 2008.

The first legal action, *Northern Territory v Arnhem Land Aboriginal Land Trust*, was lodged in 2002,[32] and became known as the Blue Mud case. It was in this case that the kaitiaki used bark cloth paintings as documentary evidence of their law over the intertidal areas. In response to the breach of tapu at Garranali, the kaitiaki of the communities, who were already involved in producing fine art, decided to prepare a number of bark cloth canvases[33] (*Bul'manydji at Gurala*, 1997) to inscribe the miny'tji (sacred designs) of the law that applies to the saltwater country.[34] That visual evidence supported the oral evidence presented by the Yolgnu in the Blue Mud Bay case and was the first time visual art had been accepted as evidence in a native title case. Unfortunately, while the final orders upheld the native title in Blue Mud Bay, the court determined that the rights were "non-exclusive" and "non-commercial".[35]

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[29] "*Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29" 12(2) Aust Indig Law Rev 82 at 82. See above n 26 for examples of scholarship on this case.

[30] Issacs and others, above n 26, at 6.

[31] At 6.

[32] *Gawirrin Gumana v Northern Territory of Australia (No1)* [2005] FCA 50; *Gumana v Northern Territory of Australia (No2)* [2005] FCA 1425. The first judge, Justice Selway, died before the final orders on the case could be made. Justice Mansfield made the final orders, following the reasoning of Justice Selway, hence the two cases.

[33] See *Image 1* in the Appendix at page 140 of this thesis for one of 80 bark paintings created in 1997 by the kaitiaki of Blue Mud Bay.

[34] Issacs and others, above n 26, at 7.

[35] *Gumana v Northern Territory (No2)*, above n 32 at [7] and [8].

On appeal by the Garranali and Yolgnu, the Federal Court of Appeal determined that the rights of the landowners under the Aboriginal Law Rights (Northern Territory) Act 1976 did include the right to exclude recreational and commercial fishing from the tidal waters.[36] A further appeal by the Northern Territory to the High Court of Australia in 2008[37] was dismissed. The High Court held that the land title under the 1976 Act includes the right to exclude commercial and recreational fishing from the intertidal zone and tidal rivers.[38] The case has been considered a landmark for its use of Indigenous visual legal documentation[39] and has encouraged other Aboriginal communities to do the same.

The function of the creative works in this case was to produce documentation of the historical and contemporary knowledge of the area, its ecology, its use, and its spiritual and physical connection to the Garranali and Yolgnu people. This relationship between the people and the land and sea is deeply embedded into the structure of how Yolgnu understand their world. Their law and practices in respect of human relationships, whakapapa obligations, and access to resources follow the physical ancestral patterns that are literally laid out on the land and the sea.[40] Those physical patterns of the landscape and seascape drive the obligations and responsibilities of and between clans.[41] In addition, the Yolgnu understand the seascape to have as distinctive and varied features as the land does – it is a fully understood, complex environment with direct whakapapa links to the people. By way of example, Miniyawany Yunupinu, artist and senior ranger for the Dhumurru Land Management, says of his painting, *Nanydjaka*:[42]

> This snake is creating these clouds in a place called Nanydjaka. The ocean part of Nanydjaka is called Makuma Yurrurrma Gandariya Gapanbulu. These words that we say other scientific names for these waters. These words that we intone in a way of tradition are of the sea and so for us Yarrwidi Gumatj | group of Gumatj these seas and the associate land belong to us. This painting means like telling stories, the heritage, the value, the knowledge we have for the sea. These clouds we call

[36] *Gumana v Northern Territory of Australia* [2007] FCAFC 23.

[37] *Northern Territory of Australia & Anor v Arnhem Land Aboriginal Land Trust & Ors* [2008] HCA 29.

[38] Issacs and others, above n 26, at 115.

[39] The 80 paintings made for this purpose were purchased by the Australian National Maritime Museum.

[40] Morphy and Morphy, above n 26, at 68.

[41] At 78.

[42] Issacs and others, above n 26, at 76.

> Marratjula only form in a certain season. We call this time Warrkarriya ga Dhurrudhurruya – when the Wakarr | bush lily flowers. The diamonds represent these waterways of Nanydjaka which means Manybuyna or the gunbilk | calm sea. Bäru the Ancestral crocodile and Gawanalkmirri the stingray are totems for us and come from a particular island here called Wuynarra.

The paintings become the clearest form of documentation of these complex connections of people (at all collective and individual levels) and the environment to which they whakapapa. Those connections form part of a legal tradition that creates binding obligations on the people to act on behalf of the ancestral patterns on the land and sea. Dula Njurruwuthun[43] is a Dirrikay of the Munyuku clan with senior inherited rights to paint. He has described how the designs express those legal obligations: [44]

> [t]ruthfully. That is it. The Yolgnu stand on their deeply embedded foundation. It is ancient and everlasting. Do not come and push the Yolgnu aside. We do not come from a long way away. This is our home. Our designs, embassies in homelands. It was for the Yolgnu that we paint. Do you know what we are doing? We are working on our Law. This is interpreting our wisdom, our foundation and the sinews of Yolgnu people. This is a true story, not lies. This hair are my head is true. The truth comes out of this hairbrush.

Howard Morphy, a Profession of Anthropology at the Australian National University, has been working with the Yolgnu people since 1974 and has spent many years working with Yolgnu elders and artists. He is of the view that not only do Yolgnu art objects encode information about the past, but that they are themselves sacred manifestations of their ancestors:[45]

> To the uninitiated, and Yolngu are quite explicit about this, the art means nothing – it contains its secrets well. Initiates only acquire knowledge of its meaning by becoming part of the encoding process – being told how to interpret the painting.

I understand from both Yolgnu descriptions of the purpose of their art and from analysis by Morphy and others that there is clearly a Yolgnu legal tradition that creates binding legal obligations on the Yolgnu people. Some of those obligations require them to do certain acts to

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[43] Note that the underlined D is a form of macron in the spelling of some Yolgnu kupu.

[44] Jaimie Lyn Isaac "Decolonizing Curatorial Practice: Acknowledging Indigenous Curatorial Praxis, Mapping Its Agency, Recognizing Its Aesthetic within Contemporary Canadian Art" (MA Thesis, University of British Columbia, 2016) at 12.

[45] Howard Morphy "Encoding the Dreaming – A Theoretical Framework for the Analysis of Representational Processes in Australian Aboriginal Art" (1999) 49 Australian Archaeology 13 at 13.

maintain relationships between each other, between themselves and their environment, and between themselves and their atua. Those acts and relationships are documented in the paintings that they create to communicate that law to themselves and to others. The paintings become both the documentation of their law and the activation of their law.

I will now review a second example, the *Ngurrara Canvas II*, made by the Ngurrara people in desert Western Australia, approximately 1,000 kilometres west of Blue Mud Bay.

B. The Ngurrara Canvas II

The *Ngurrara Canvas II*[46] (*Ngurrara Canvas II*, 1997) is a large painting made by the Ngurrara people and was used as visual evidence for a native title claim over an area of desert wetland in Western Australia. The claim, *Neowarra v State of Western Australia*,[47] concerned an application for a determination of native title under the Native Title Act 1993. The Act is designed to recognise and protect native title and to provide a mechanism for its determination.[48] The claimants had been forcibly removed from their land in the 19th century[49] but were nonetheless successful in establishing that they continued to exercise their traditional rights over the land, amounting to "possession, occupation, use and enjoyment to the exclusion of all others".[50] Tommy May, one of the *Ngurrara Canvas II* artists said:[51]

> I believe that [native title] is about black fella law. The painting is only for proof. When I go to court to tell my story, I must listen very carefully before I open my mouth. Maybe the Kartiya [white people] will say "We don't believe you" That's why we made this painting, for evidence. We have painted our story for native title people, as proof. We want them to understand, so that they know about our painting, our country, our ngurrara. They are all the same thing.

The *Ngurrara Canvas II* painting was a collaboration of about 50 artist elders from the Jiwaliny, Mangala, Manyjilyjarra, Walmajarri, and Wangkajungka clans, who painted a 10-

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[46] See *Image 2* in the Appendix at page 141 for a reproduction of the *Ngurrara Canvas II*.

[47] *Neowarra v State of Western Australia* [2004] FCA 1092.

[48] Section 3.

[49] Akhtar, above n 26, at 408.

[50] Lisa Strelein "*Neowarra v State of Western Australia* [2003] FCA 1402 (8 December 2003)" (2003) 4 *Native Title Newsletter* 4 at 6.

[51] Anker, above n 26, at 142.

metre-by-6-metre canvas over two weeks while on Country.[52] The painting was a representation of the claimant Country, but it was not a map as much as a visual description of the use of areas, the migration of peoples through those areas and the connections between the different groups who use those areas.[53] The painting was done in Pirnini, within the boundaries of the land subject to the claim. The claim led to a successful outcome with the Ngurrara people now exercising native title rights over some 75,000 square kilometres of land.[54]

The canvas was used in the court as an appeal to the "senses through colour and rhythm, a sense of space and a smell of dust; and by referents in intercultural knowledge between Indigenous and colonial cultures".[55] Eleonor Wildburger argues that the acceptance of the canvas as "evidence confirms that the 'stories', implied in the artwork, are legal documents that proved and re-established land-ownership".[56] She believes that this means that Indigenous law is valid alongside state law.[57]

Kirsten Anker, an Associate Professor at McGill University in Canada, analyses the *Ngurrara Canvas II* as map, as truth and as law in her book *Declaration of Interdependence – A Legal Pluralist Approach*.[58] Her book focuses on legal pluralism as a means to establish a dialogue between the state legal system and Indigenous legal traditions. Anker says that in interpreting the visual documentation of Indigenous law, that documentation has to be decoded. The "grammar and idiom of this code have to be respected and followed"[59] for it to be legible to a reader outside of the culture[60]

> Its norms have to be taken seriously. How else does a dot establish a title, than if the law binding that dot to a whole conceptual universe is followed as a principle of interpretation – as a law?

She describes how the process of transferring the 'design creation' to designs on canvas becomes a means of meeting the kaitiakitanga | trusteeship obligations of the Ngurrara people

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[52] At 141.

[53] Akhtar, above n 26, at 408.

[54] Yanunijarra Aboriginal Corporation <http://www.yanunijarra.com/>.

[55] Akhtar, above n 26, at 408.

[56] Eleonor Wildburger "Indigenous Australian Art in Practice and Theory" (2013) 10 Coolabah 202 at 205.

[57] At 205.

[58] Anker, above n 26.

[59] At 148.

[60] At 141.

to their land. Because they understand that obligation as a law, the act of creating the canvas becomes a manifestation of both the law itself and the obligation to follow that law. Therefore, the creation of the canvas helps them to meet their kaitiaki | trustee obligations particularly in the circumstances where the people have become separated from the land.[61] The designs created by the Ngurrara kaitiaki, through the dreaming, are the designs of the land, the rocks, trees, waters, people and animals as part of their whakapapa. In creating the designs for others to see, the whakapapa of the dreamer to the land is written and rewritten, quite literally, as the law of the land.

IV. He Mutunga

The two examples discussed in this chapter demonstrate how the Yolgnu and Ngurrara peoples have documented their law in their creative works. The examples in this chapter are compelling because the kaitiaki know how to 'write' and 'read' their visual law. They are teaching that visual language to younger people in order to maintain cultural connections and uphold their law and tikanga. That literacy still lives and is being passed on. The examples do raise a question about the impact of colonisation on the Indigenous mātanga ture | legal experts and the Indigenous readers of that visual law. Other clans of Aboriginal and Torres Strait Islanders, and other Indigenous peoples who have survived colonisation, may not always have those mātanga ture to write, read and teach their legal visual language. It may be a skill in decline or on the rise, depending on the circumstances of those Indigenous peoples. However, despite the impacts of colonisation on Indigenous mātanga ture, this chapter has shown that there are examples where Indigenous peoples use non-written visual documentation to communicate their law to themselves and to those outside their culture.

I find it satisfying to see that the Australian state legal system is recognising Indigenous legal traditions of visual documentation. It shows that the legal system is, albeit slowly, developing more nuanced native title legal frameworks that may cope better with Indigenous evidence relating to Indigenous legal concepts. I do think, however, that Wildburger has taken her analysis a step too far in saying that the acceptance of the *Ngurrara Canvas II* as evidence in a native title case means the Australian legal system accepts the validity of Indigenous law. As I

[61] At 147.

discussed earlier,[62] there a significant conceptual lacuna between Indigenous law as evidence weighed within a state legal framework and Indigenous law as an applied legal framework within which evidence is weighed.

The concern of this thesis is not whether such visual works meet the state's criteria for evidence or the state criteria for the validity of law. This thesis is concerned with whether the visual works are themselves documentation of Indigenous law, as understood within the Indigenous legal tradition. In this chapter I have shown how a different kind of visual language can be legal documentation by drawing on multimodal and visual literacy theory. I have considered how different forms of literacy can be combined, and I have demonstrated that cultures will place different values on different forms of literacy depending on the historical, social and political context of that culture. I have also shown how it is necessary to both understand the visual language of the communication and appreciate the cultural context in which it is made in order to effectively read that visual language. This chapter is important for this thesis because it demonstrates ways to read the visual language of law without an alphabet. The two examples of visual literacy discussed, the *Saltwater Collection* and the *Ngurrara Canvas II*, demonstrate that Indigenous peoples do have visual documentation by which they communicate their law. In the next chapter I consider in more detail how encoded objects are used as a form of Indigenous visual literacy.

[62] See pages 18-19 of this thesis for a discussion of tikanga Māori treated as as evidence in New Zealand's common law.

Te Wāhanga Tuawha – Encoded Objects

> The heritage is not pagan and primitive; nor is it the mere whittlings of cannibal savages. Rather when our art is freed from the white man's burden, we can at last see it clearly as our heritage and our legacy.[1]

In this chapter I describe the concept of the encoded object. Encoded objects should be understood in light of the cultural context of the maker and their intended purpose for the object.[2] I then make the argument that some Indigenous art objects can, and ought to be, understood as objects encoded with law. I discuss examples of where encoded Indigenous objects have been subject to Western analyses that have failed to engage with the cultural context and therefore misinterpreted the object. This chapter is important for this thesis because it shows that there are multiple means of encoding law into objects that can then be read by others.

I. Cultural Context of Encoded Objects

Where a culture uses its artistic system to create objects whose primary, but not sole, purpose is to communicate information across time and place, those objects can be said to be "encoded objects".[3] The form, shape, materiality, surface design and construction of the object can all contribute to the meaning it holds, as can the nature and status of its maker and the time and place of its making.[4] Both the *Saltwater Collection* and the *Ngurrara Canvas II* can be described as encoded objects, created within a cultural framework for communicating cultural information – in these cases, law. A rākau whakapapa | genealogy stick is an example of an encoded object, used as a mnemonic device to assist tohunga recite whakapapa.[5] A wampum

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[1] Hirini Moko Mead *Magnificent Te Maori: Te Maori Whakahirahira* (Heinemann Publishers (NZ), Auckland 1986) at 12.

[2] Sherry Farrell-Racette "Encoded Knowledge: Memory and Objects in Contemporary Native American Art" in Nancy Marie Mithlo (ed) *Manifestations: New Native Art Criticism* (Museum of Contemporary Native Arts, Santa Fe, NM, 2011) 40 at 43.

[3] Howard Morphy "Encoding the Dreaming – A Theoretical Framework for the Analysis of Representational Processes in Australian Aboriginal Art" (1999) 49 Australian Archaeology 1 at 13.

[4] Farrell-Racette, above n 2, at 42.

[5] Bradford Haami *Pūtea Whakairo Māori and the Written Word* (Huia Publishers, Wellington, 2004) at 17.

belt, used by First Nations peoples from North America to document treaties and agreements, is another form of encoded object.[6] Encoded objects can take multiple forms including paintings, textiles, tattoos and carvings.

An encoded object needs to be understood by its full cultural context, which includes why and for whom it was made. Morphy, writing about the encoded meaning of Aboriginal art, says that it is critical to ask not just "what does it mean" but to inquire as "to whom it means, and in what context, and what knowledge has to be brought to bear before it can be interpreted in the ways it is."[7] Morphy is clear that in respect of Aboriginal art, the art has language-like properties that encode and communicate meaning that not only has to be learnt but also requires knowledge of the context in with the art is created. He warns that the text may never be fully understood by an 'interpreter' because it requires deeper understanding from inside the culture.[8]

It is important to look outside of our own assumptions of what law is and how it can be communicated if we want to fully engage with the legal legitimacy of Indigenous encoded objects.[9] That means first understanding how Indigenous peoples construct their legal traditions from their cultural values and world view. This is the deliberation and reasoning process inherent in legal traditions that was described by Napoleon.[10] We then need to listen to what Indigenous peoples say about how they have documented the law that stems from that legal tradition. And even if our understanding is incomplete, as Morphy has suggested it may have to be,[11] we can still engage with that law and its encoded objects equitably and on its own terms.

I suggest that this exercise is essential for lawyers and legal scholars who want state law to work more effectively for Indigenous peoples in colonised countries. This approach also assists Indigenous legal scholars who want to whakamana | empower our legal traditions. Encoded objects become a potential tool for communicating Indigenous law, and as I suggest in this

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[6] Jeffery G Hewitt "Certain (Mis)conceptions Westphalian Origins, Portraiture and Wampum" in Shane Chalmers and Sundhya Pahuja (eds) *Routledge Handbook of International Law and the Humanities* (Routledge, London, 2021) 159 at 171.

[7] Morphy, above n 3, at 21.

[8] At 21.

[9] Kirsten Anker *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Ashgate Publishing, England, 2014) at 148.

[10] See page 40 of this thesis for a discussion on Napoleon's description of the deliberation and reasoning process.

[11] Morphy, above n 3, at 21.

thesis, Māori law. The *Saltwater Collection* and the *Ngurrara Canvas II* examples I discussed in Chapter 3, show how Indigenous legal traditions can be recorded as legal documentation and therefore facilitate a more just outcome for Indigenous peoples in state legal disputes. But these outcomes have not been the norm in state legal systems. In fact, it is quite the opposite. Most often, I suggest, these Indigenous encoded objects and the law they contain have been undervalued, undermined and misinterpreted to deprive them of their legal validity.

II. Misinterpretation of Encoded Objects

Describing Indigenous objects as the tribal art of "primitive" societies[12] is a historical colonisation tool used to undermined Indigenous political and legal sovereignty.[13] The effect of that description of Indigenous object-making is to diminish the full cultural literacy of the object.[14] The concept of 'primitive' Indigenous art and objects persisted all through the 20th century and mainly focused on the art of Africa, Oceania and Asia. It is a concept of Indigenous peoples as de-historicised cultures, that is without a historical context, and romanticised as simple, natural and mystical.[15] Cunneen observes that the narrow Western classification of Indigenous art as primitive was a consequence of separating the art from its "broader cosmological and ontological meanings".[16] This is the process of separating and therefore undervaluing the cultural context of the object and its maker.

Laura Fisher explores the impact of this separation for the objects of Aboriginal and Torres Strait Islander peoples, in her published critique *The Art/Ethnography Binary: Post-Colonial Tensions within the Field of Australian Aboriginal Art.*[17] When Indigenous objects are displayed in natural history museums, they are often presented from an evolutionist perspective, suggesting the objects belong to a people who are primitive and near extinct. The

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[12] Moshe Barasch "Introduction: Conditions of Modern Primitivism" in *Modern Theories of Art 2: From Impressionism to Kandinsky* (NYU Press, New York, 1998) 191 at 193.

[13] See page 29 '*Some Historical Observations'* for the discussion on the historical colonisation process.

[14] At 194.

[15] Laura Fisher "The Art/Ethnography Binary: Post-Colonial Tensions within the Field of Australian Aboriginal Art" (2012) 6 Cultural Sociology 251 at 260.

[16] Chris Cunneen "Visual Power and Sovereignty: Indigenous Art and Colonialism" in Michelle Brown and Eamonn Carrabine (eds) *The Routledge International Handbook of Visual Criminology* (Routledge, New York, 2017) at 379.

[17] Fisher, above n 15, at 255.

artefacts are therefore viewed as one-dimensional examples of the property of 'general community practice' rather than as complex, creative and individually valued objects.[18] This presentation assumes that tradition has "strictly determined the character of community members' creative output"[19] and if the tradition is primitive, so therefore are its creative works. This narrow presentation of the encoded objects obscures the complex relationship between Indigenous peoples, the objects they make, the specific purpose of their making and the cultural roles of the maker and the object.

Indigenous peoples have said that their communities, language, culture, history, and objects are intrinsically linked.[20] Contrary to the idea that Indigenous societies constrain the creative output of their members, Indigenous peoples value the individual and collective pursuit of creative expression and skill because the "objects ... embody their makers knowledge and the times of their creation. ... Their forms and materials are narrative accounts of struggle, innovation in continuity."[21] Indigenous peoples are describing a creative and cultural conversation that happens between the maker, the object and their community. In the process of that conversation, some of the objects begin to take on a greater cultural significance and authority. Shelley Niro, a Mohawk bead artist says of her work:[22]

> The ancient pieces pull me back to a time when the bead was a tool for people in our communities, who have the materials as if they were paint to create scenarios as in a play, even record the moment as a photograph would. These ancient and not so ancient documents call out for company.

The perspective of the maker and their culture is crucial to understanding how encoded objects have a more complex relationship with the maker and the maker's people than the colonial gaze might read. Encoded objects contain artistic innovation, social, political, and legal

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[18] At 255.

[19] At 255.

[20] See Grace L Dillon *Walking the Clouds: An Anthology of Indigenous Science Fiction* (University of Arizona Press, Tucson, 2012); Hirini Moko Mead *Te Maori: Maori Art from New Zealand Collections* (Heinemann Publishers (NZ) Ltd, Auckland, 1984); Rangihīroa Panoho *Māori Art: History, Architecture, Landscape and Theory* (David Bateman, Auckland, 2015); RedDot Fine Art Gallery *Spinifex People Spinifex Lands A Collection of Fine Spinifex Indigenous Art* (RedDot Fine Art Gallery, Singapore, 2018); David Simmons *The Carved Pare: A Māori Mirror of the Universe* (Huia Publishers, Wellington, 2001); Damian Skinner *The Carver and the Artist: Māori Art in the Twentieth Century* (Auckland University Press, Auckland, 2008); and Awhina Tamarapa *Whatu Kākāhu: Māori Cloaks* (Te Papa Press, Wellington, 2019).

[21] Farrell-Racette, above n 2, at 41.

[22] Morgan Perkins "Continuity and Creativity in Iroquois Beadwork" (2004) 106 American Anthropologist 595 at 598.

documentation, as well having functional relevance, "enfold[ing] memory and words [to] move knowledge forward to another generation".[23] Terms such as 'primitive', or the similar terms 'artefact' or 'cultural property' undermine this complexity as Tā Mead has noted in this comment from the opening of this chapter:[24]

> The heritage is not pagan and primitive; nor is it the mere whittlings of cannibal savages. Rather when our art is freed from the white man's burden we can at last see it clearly as our heritage and our legacy.

I have described how encoded objects have been misinterpreted by colonial systems by being treated as primitive, simplistic and separated from their cultural context. I will now discuss two examples where a narrow Western view of Indigenous legal documentation has undermined the Indigenous law encoded into objects. These examples show how Indigenous legal documentation has been treated as 'cultural property' or 'material object' by institutions such as museums, rather than as objects encoded with law. The legal force of these encoded objects is diminished by such misapplied terms. These two specific examples come from First Nations Indigenous communities in Canada – Gwinu crest blankets as leadership documentation and wampum belts as international treaties.

A. House Gwinu Ayuks – crest blankets

In *The Law is Opened: The Constitutional Role of Tangible and Intangible Property in Gitanyow*,[25] the authors described the results of a series of interviews with members of the House of Luuxhon about the misuse of Gitxsan artefacts. The interviews, conducted in 2002, concerned Indigenous laws on the ownership, protection and control of Indigenous cultural heritage, cultural objects, sacred sites and intellectual property. The interviews focused on one house of the Gitxsan legal order, House of Luuxhon.[26] The Gitxsan are made up of a number of family lineages, by matrilineal line, formed over time into a number of House groups. The House groups occupy traditional lands in what is now the northwest of British Columbia. Each

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[23] Farrell-Racete, above n 2, at 43.

[24] Mead, above n 1, at 12.

[25] Richard Overstall, Val Napoleon and Katie Ludwig "The Law Is Opened: The Constitutional Role of Tangible and Intangible Property in Gitanyow" in Val Napoleon and Catherine Bell (eds) *First Nations Cultural Heritage and Law Case Studies, Voices, and Perspectives* (UBC Press, Vancouver, 2008) 92 at 93.

[26] At 94.

Gitxsan House group belongs to one of four clans Frog, Eagle, Wolf, and Fire weed.[27] The House groups interact according to their own specific legal order and each is independent of the other; there is no overarching ruling process for the four clans as a single entity. The property and possessions of each clan is governed by their own laws.[28]

The authors of the article were inquiring into why the term 'cultural property', which is rarely if ever used to describe Western property, is widely used in state law to describe Indigenous property. The authors set out to understand the diminished value implied by the term 'cultural property'. The elders of House of Luuxhon considered that many of the objects described as cultural property contain "images, words, and music [and] have a critical constitutional role in [I]ndigenous law."[29] The authors suggest that validity of Gitxsan law is obscured because there is no state recognition of Indigenous terms to describe the legal and political value of the objects to their owners. The state assumes that Indigenous property does not have a political or legal impact on the state. Therefore, the state devalues that property by the terms it uses to describe it.

Of significance to this thesis is the discussion in the article with Godfrey Goode, the chief of House Gwinu, of the Frog clan, about the clan property that holds leadership authority for the House of Gwinu. That property included Goode's chiefly name, a set of ayuks | crests (no image available) and a set of songs. Goode was given his Chief name at about 35 years old, and was instructed by the matriarch to look after and honour that name, to make sure he was visible and to uphold its status, such as through the provision of feast. Normally as part of his acquisition of the name he would also receive two specific crest blankets with the Gwinu ayuks | crest image stitched onto it and a xwts'an | crest pole that accompanies the crest blankets. It is against Gwinu law to take the crests that belong to chief if you are not entitled to them.[30] Only the family who holds the authority for those crests is entitled to use and wear them.

It seemed that these crest blankets had been sold to the K'san Historical Village and Museum by a previous holder of the chiefly name, during a difficult time for the clan. The tribe had suffered a significant theft in advance of a state raid some years earlier. With depopulation caused by the colonisation process, the community did not have the numbers to defend their

[27] At 94.

[28] At 94.

[29] At 93.

[30] At 98.

property against the theft and subsequently, that Chief, whose clan was decimated by war and colonial disease and whose clan property was taken, could not fulfil his feasting obligations. He reportedly gave away the remaining property, including the crest blankets, in despair.

A previous Chief had ordered a replica of one of the crest blankets to be made but the museum charged $7,000 for the replica. That was unaffordable so it was left with the original at the museum. Goode also tried to get the replica from the museum for his ceremonial use, but the museum still wanted $7,000 for it.[31] When Goode asked to simply borrow the replica for a pole raising ceremony, the museum refused even to lend it unless he paid the $7000. Goode said in the interview that he was less concerned about the possession of the crest blankets than he was about the ability to wear the crest blanket for the pole raising ceremony as part of his leadership authority. He eventually had a replica of the replica made for $2000 but even retrieving that one was a long and difficult process.

The purpose of these extraordinary efforts just to obtain copies of the Gwinu crest blankets was to *activate* the legal authority of the crest blankets by the appropriate legal authority figure at the appropriate legal event. These encoded objects had value to the tribe for their use as the legal documentation of chiefly authority. Their possession as objects was meaningless unless in the hands of the leadership to which they belonged. Goode could not grasp how the museum could value the mere possession of the crest blankets as opposed to their use:[32]

> I don't know if this white person that took these things is aware of the laws of our people – how important these are to us. Our law does not allow other people to wear what belongs to another. The law is still the same today; it is none of their business ... I just told them that other people cannot wear this blanket and its crest; it does not belong to anyone else. They should know the laws of our people. They have many of our things there.

Clearly the museum valued the crest blankets for preservation purposes as cultural artefacts. The legal content of the Gwinu crest blankets was not valued at all by the museum. But under Gwinu law, the value lay in their status as encoded objects identifying legal authority of chieftainship. The crest blankets, the crests themselves and the crest poles held legal authority that identified the current legal legitimacy of the Chief and his or her actions and decisions on

[31] At 99.

[32] At 100.

behalf of the tribe. The museum failed to understand the full meaning and purpose of the Gwinu crest blankets except as a material artefact for its display.

B. Wampum as International Treaty

Wampum have been used as legal documentation by First Nations peoples for over a thousand years.[33] Wampum are belts made of tubular beads from quahog clam shells (white and purple/black) strung together on hemp or sinew [34] (*replica, Two Row Wampum,1613*). Wampum were and are still used in political and ceremonial events to record those events and document agreements such as treaties, marriages and wars.[35] Haas, in comparing the technologies of hypertext[36] and wampum as both "associative system[s] for indexing, storing, retrieving, and delivering of memories" describes wampum as 'multimodal' where the technologies:[37]

> woven into the belt have communicative agency, as with the colors of the shells and the design patterns. The cultural context and community where the wampum resides is yet another source of meaning that gets encoded into the wampum. Thus wampum is a hypertext of communicative modes—all of which contribute to cultural knowledge production and preservation.

Wampum were regularly read and re-read as descriptions of the events that they recorded. In this way, wampum can be said to be encoded objects that embody "memory, as it extends human memories of inherited knowledges via interconnected, nonlinear designs with associative message storage and retrieval methods."[38]

Wampum are a legal documentation technology that makes Indigenous international agreements physically real and readable. Western legal systems also use legal documentation technologies for this purpose. In analysing the use of the typewriter in recording the "Western Treaty 8" between the Cree, Beaver and Chipewyan tribes, and the English Crown in 1899,

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[33] Angela Haas "Wampum as Hypertext: An American Indian Intellectual Tradition of Multimedia Theory and Practice" (2007) 19 Studies in American Indian Literatures 77 at 78.

[34] See *Image 3* in the Appendix at page 142 of this thesis for reproduction of a two row wampum.

[35] Hewitt, above n 6, at 160.

[36] Hypertext is linked information. It can be text, pictures, videos or graphics. Webpages uses hypertext when a word or image contains a hyperlink that, when clicked, moves the reader to a new peice of information. Hypertext can come in many forms but is most often used in relation to how information is stored, connected and retrieved through the internet.

[37] Haas, above n 33, at 91.

[38] At 81.

Hohmann uses the recording object – the typewriter – to show how objects are used to mediate international law. She suggests that if a treaty's terms are to become law in a concrete way, those terms must become real in a material way – through the production of objects.[39] In this case one such object was the typewriter used to produce another object – the written paper treaty. Hohmann notes that wampum are the equivalent Indigenous material object that concretises such treaties between these tribes and other states.[40]

However, that is not the common understanding of wampum.[41] Hewitt has discussed wampum in more detail as records of extant international law and is critical of how they are treated as curios and artefacts in museums as opposed to material records of international law.[42] He says the wampum, such as the Two Row Wampum of Niagara 1764, are disregarded as records of law by the colonial state and instead considered material objects divorced from their current and historical political and legal authority under Indigenous law.[43]

The Two Row Wampum Treaty of Niagara 1764 was the Indigenous documentation of the treaty negotiations that developed between the First Nations and the British in relation to the Royal Proclamation of 1763.[44] The Royal Proclamation, promoted by the British, essentially affirmed the principle of continuity,[45] guaranteeing to the First Nations peoples that Indigenous lands would not be taken without their consent.[46] The Proclamation also claimed sovereignty and dominion over First Nations land, but the First Nations people were not told that.[47] In 1764 the Proclamation formed the basis of a Treaty through a major gathering of some 2000 First Nations people at Niagara to confirm and formalise the international treaty with the British.[48] The British were aware from previous First Nations treaty negotiations that wampum were an

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[39] Jessie Hohmann "The Treaty 8 Typewriter: Tracing the Roles of Material Things in Imagining, Realising and Resisting Colonial Worlds" (2017) 5 London Review of International Law 371 at 374.

[40] At 374.

[41] Or of typewriters for that matter.

[42] Hewitt, above n 6, at 160.

[43] At 161. For more on the legal authority of Wampum, see John Borrows "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch (ed) *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (UBC Press, Vancouver, 1997) 155; and Haas, above n 32.

[44] Borrows, above n 43, at 157.

[45] See page 30 of this thesis for a description of the principle of continuity.

[46] Borrows, above n 43, at 158.

[47] At 160.

[48] At 162.

Indigenous legal form of documentation of treaties. Sir William Johnson, the then Superintendent of Indian Affairs and the British officer responsible for the Treaty development, had planned to confirm, with the exchange of wampum, the exchange of promises within the Treaty:[49]

> Johnson further proposed, on behalf of the British, that "at this treaty... We should tie them down (in the Peace) according to their own forms of which they take the most notice, for example by exchanging a very large belt with some remarkable and intelligible figures there on."

Hewitt says that the Crown fully understood and engaged in "international law-making utilising an Indigenous form" because they had been involved with these kinds of negotiations from the early 17th century.[50] During the final negotiations of the 1764 Treaty, the Crown provided the wampum to the First Nations diplomats as evidence of the agreement, demonstrating that "the Crown recognised, understood and acknowledged that Indigenous nations were engaged with international law in a different way from the Crown's European-based practices."[51]

Hewitt describes wampum as a "human made, written set of rules negotiated and agreed upon by the relevant parties, including sovereign states".[52] And he is scathing of the subsequent treatment of wampum, including the Two Row Wampum of Niagara as museum objects because:[53]

> in spite of subsequently placing wampum in museums as cultural objects, in the eighteenth century the English Crown was well aware that wampum is international law. The English were also literate enough in wampum diplomacy to know how to use it.

In the case of wampum, the colonial state was fully aware of the cultural context, purpose and value of wampum as Indigenous legal documentation of international treaties. The Two Row Wampum of Niagara 1764 was just one of several wampum treaties with European foreign powers that had been negotiated over the previous century. The subsequent treatment of wampum as museum artefacts rather than legal treaties could be considered a deliberate attempt

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[49] At 162.

[50] Hewitt, above n 6, at 170.

[51] At 170.

[52] At 171.

[53] At 170

to erase the law contained within them in order to maintain a Crown legal narrative "framing… Indigenous peoples as savages to be tamed".[54] However, Hewitt argues this treatment of wampum does not erase its law:[55]

> [o]ne must be able to read the language in which the law is written to fully engage with its meaning. Failure to derive meaning from wampum is not a failing of Indigenous legal orders, it is demonstrative of illiteracy, however widespread.

This example of wampum differs from that of the Gwinu crest blanket because in the case of the crest blanket, the museum appeared wilfully ignorant of the law encoded into the crest blankets they displayed. That ignorance meant that the legal authority of the crest blankets was ignored, despite the assertions from the clan Chiefs that they were encoded with their law. The law was encoded into these objects whether other people were able to or chose to read that law or not.

III. He Mutunga

Understanding the cultural context can help to determine what sort of information, if any, is encoded into an object, how that object might be read, and by who. These examples of the Gwinu crest blankets and wampum international treaties help to demonstrate the importance of understanding encoded objects within the cultural context of their making, on the assumption that understanding is the first step towards respect for the object's purpose. In the case of the Gwinu crest blankets, the purpose of their making and their use was directly related to the law governing leadership and its responsibilities. The failure of the K'san Historical Village and Museum to understand the purpose and content of the object caused both significant distress and undue financial cost to the Gwinu clan and leadership, whether deliberate or unintended.

In the case of wampum, there is evidence that colonial and state authorities have, in the past, fully understood the legal authority embedded in wampum belts. Those authorities used wampum to document international treaties because they did understand them as documentation. In the end it becomes a political decision as to whether the Indigenous legal authority in Indigenous documentation will be recognised. It is not a question of whether the

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[54] At 172.

[55] Borrows, above n 43, at 161.

legal authority exists, and neither is it a question of interpretation or literacy. Indigenous peoples, as we saw with the *Saltwater Collection*, *Ngurrara Canvas II*, and the wampum international treaties, remain subject to Crown or state largesse on whether their legal traditions and their legal instruments will be acknowledged as valid. It is not a question of whether the law is encoded into those objects – it clearly is. I suggest therefore that a key question of this thesis, whether Indigenous peoples encode Indigenous law into at least some objects, is answered in the affirmative, in this chapter. In the following chapter I will return to detail how Māori have constructed our legal arrangements.

Te Wāhanga Tuarima Māori Law

> [T]he value system on which Tikanga Māori is based, is aspirational, setting desirable standards to be achieved. Thus, where our state law sets bottom lines, or minimum standards of conduct below which a penalty may be imposed, Tikanga Māori sets top-lines, describing outstanding performance where virtue is its own reward.[1]

In this chapter I explore the scholarship on tikanga Māori as the cultural framework from which Māori have derived our legal tradition. I describe the values of tikanga Māori and how they operate as legal principles of the Māori legal tradition. I set out how the legal principles govern complex personal, social, environmental and spiritual relationships within te ao Māori. I will discuss seven of those principles in detail and how they create the practice of Māori law. This chapter is important to this thesis because it describes the law that may be encoded into whakairo Māori.

I. Tikanga Māori

Tikanga Māori is the set of values, principles, understandings, practices, norms and mechanisms from which a person or community can determine the correct action in te ao Māori.[2] Tikanga Māori is kinship-based with:[3]

> the ethical and common law issues that underpin the behaviour of members of whānau, hapū and iwi as they go about their lives and especially when they engage in the cultural, social, ritual and economic ceremonies of their society.

Tikanga comes from the kupu | word ‘tika’ meaning that which is right or just,[4] and identifies how “correctness, rightness or justice is maintained”.[5] Tikanga Māori is a values-based system

[1] Edward Taihākurei Durie and others “Ngā Wai o te Māori Ngā Tikanga me Ngā Ture Roia” (paper prepared for the New Zealand Māori Council, 2017) at 8.

[2] ET Durie “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8 OLR 449 at 452.

[3] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2016) at 15.

[4] ET Durie “Custom Law” (paper prepared for the New Zealand Law Commission, Wellington, 1994) at 27.

[5] Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai Law Rev 94 at 2.

where values govern relationships between people, between people and the natural environment, and between people and the spiritual world. Those values can be understood as the 'ways of being Māori' just as the principles derived from these values create legal binding rights and responsibilities on a person or a community.

Jones[6] clarifies that tikanga Māori is a wide concept of te ao Māori which includes but is not limited to law. Tā Williams has also said that "tikanga and law are not co-extensive ideas"[7] but that tikanga contains law. Coates has described tikanga as being a "sphere of law":[8]

> a self-contained functional legal order that has rules, values, principles and processes dictating how customary practices are identified, how disputes are resolved, and how rules and protocols can change or be developed over time.

It is not necessary to determine a strict line between what is law and what is not within tikanga Māori. I suggest that such an exercise is unnecessary in a values-derived de-centralised kinship social structure where principles rather than rules govern the behaviour of a community of people. It is adherence to principles set, as Tā Durie has described, as a high standard to meet, that informs individual and community behaviour and drives the processes that determine whether a legal principle has been broken (at the risk of serious social disadvantage) and how restoration for the harm caused can be achieved. I focus primarily on the Māori legal tradition in the following discussion and draw on existing scholarship to detail the principles of the Māori legal tradition and the binding rights and obligations that can be derived from them.

II. Māori Legal Tradition – Principles

The concept of the "Māori legal tradition" defined by Jones encompasses Māori legal practice, principles, processes, procedures, and Māori legal knowledge. When we describe the Māori legal tradition, we can begin with a discussion of *principles*, from which law flows. I understand these principles are derived from the values of tikanga and developed through Māori social, political and spiritual institutions. Jones has described five such principles

[6] See pages 42-43 of this thesis on Jone's analysis of the difference between tikanga Māori and the Māori legal tradition.

[7] Williams, above n 5, at 3.

[8] Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2015) 1 NZLR 1 at 4.

considered foundational by Māori scholars, including Tā Hirini Moko Mead, Tā Joseph Williams, and Tā Edward Taihākurei Durie.[9] The principles are also described in a New Zealand Law Commission Study Paper.[10] Those foundational principles are:[11]

> Whanaungatanga – The centrality of relationships to Māori life.
>
> Manaakitanga – nurturing relationships, looking after people, and being very careful how others are treated.
>
> Mana – the importance of spiritually sanctioned authority and the limits on Māori leadership.
>
> Tapu – respect for the spiritual character of all things.
>
> Utu – the principle of balance and reciprocity.

Tā Mead includes noa and ea in his assessment of the foundational principles.[12] Noa and ea are two principles that focus on the restoration of balance from circumstances of danger or tapu. Interestingly, Tā Durie includes arohatanga in his analysis, describing arohatanga as the "basis for peaceful co-existence".[13] Both Tā Mead and Tā Durie are suggesting that a core principle of the Māori legal tradition is one that explicitly requires resolution and balance, beyond the principle of utu. Tā Williams includes kaitiakitanga as an express legal principle, because, he says, it concerns the reciprocal obligation to care for others, human and natural.[14] Jones links tapu with noa in his analysis and describes kaitiakitanga and rangatiratanga as "associated concepts" to his restatement of the foundational principles.[15]

Following Jones and Williams, I too have added kaitiakitanga to the list of foundation principles of the Māori legal tradition. Kaitiakitanga is the obligation to care for one's own, a subset of whanaungatanga.[16] Kaitiakitanga has been described as derived from

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[9] Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (University of British Columbia Pres, Vancouver, 2016) at 38.

[10] New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (SP9 New Zealand Law Commission, Wellington, 2001) at 28.

[11] Jones, above n 9, at 38.

[12] Mead, above n 3, at 35.

[13] Durie, above n 2, at 455.

[14] Williams, above n 5, at 3.

[15] Jones, above n 9, at 85.

[16] Williams, above n 5, at 4.

whanaungatanga[17] as it is the expression of responsibility and obligation to the natural environment to which Māori have a whakapapa relationship. This will be discussed in more detail in the following sections; suffice to say for the moment that kaitiakitanga is a relatively modern term as a legal principle.[18] It is now commonly understood as identifying legal rights and obligations to natural resources within the state legal system, for example as defined in section 2 of the Resource Management Act 1991.[19] I consider that it is therefore useful to understand it as a principle belonging to the Māori legal tradition in its own right because of its explicit and frequent use as a legal principle.

I have also added rangatiratanga to the list of core principles of the Māori legal tradition. This kupu has also come into regular use in determining specific forms or attributes of authority and leadership, separately from the principle of mana.[20] Rangatiratanga can be understood as a derivative of mana, and has come to denote the activity of leadership[21] or political authority[22] by a person or a group in a different way from the spiritually sanctioned mana of an individual. Jones identifies rangatiratanga as a term to express authority and leadership and one that is used frequently in treaty settlement legislation.[23]

For the purposes of this thesis, these seven principles form the core of the Māori legal tradition which I will discuss in more detail. It is important to understand the legal application of the principles when analysing how encoded objects, such as pou whenua, can hold that legal information and be a form of legal authority within the Māori legal tradition.

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[17] At 4.

[18] New Zealand Law Commission, above n 10, at 40. See also Merata Kawharu "Kaitiakitanga: A Maori Anthropological Perspective of The Maori Socio-environmental Ethic Of Resource Management" (2000) 109 Journal of the Polynesian Society 349.

[19] Jones, above n 9, at 72.

[20] Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, NZ, 2013) at 331.

[21] New Zealand Law Commission, above n 10, at 80.

[22] Jones, above n 9, at 103.

[23] Treaty settlements are the result of direct negotiations between the New Zealand Government and iwi | Māori tribes over redress for the settlement of historical claims of state failures to uphold the principles of Te Tiriti o Waitangi | The Treaty of Waitangi. The settlements are confirmed in legislation, the first in 1995. See for example the Waikato Raupatu Claims Settlement Act 1995, Rangitāne Tū Mai Rā (Wairarapa Tamaki nui-ā-Rua) Claims Settlement Act 2017 and the Ngāti Hinerangi Claims Settlement Act 2021.

III.Māori Legal Tradition – Law

By drawing on the work of other Māori scholars and for the purposes of this thesis, I am defining the Māori legal tradition as containing seven core principles whose legal aspects confer binding legal rights and responsibilities. Those principles are:

1. Whanaungatanga – the centrality of relationships to Māori life.
2. Kaitiakitanga – the care and responsibility for natural resources.
3. Manaakitanga – nurturing relationships, looking after people, and being very careful how others are treated.
4. Mana – the importance of spiritually sanctioned authority and the limits on Māori leadership
5. Rangatiratanga – the exercise of governance and leadership of Māori.
6. Utu – the principle of balance and reciprocity.
7. Tapu – respect for the spiritual character of all things.

I will describe and discuss each of these principles in more detail, and note the legal aspects that confer binding legal rights and responsibilities. For this I rely to a very great extent on Māori writing generally, and these three publications specifically: *Te Mātāpunenga*,[24] the Law Commission's *Māori Custom and Values*,[25] Jones's *New Treaty New Tradition*[26] and Tā Mead's *Tikanga Māori*.[27] I do not include all possible legal rights and responsibilities – that is literally an epic undertaking. I have instead selected those legal rights and responsibilities that best demonstrate how the principles apply in Māori law. My analysis is intended as a starting point, not a comprehensive summary of a deep and complex legal tradition. These concepts are identified in the literature so that we can discuss and debate them, contest their use and envision how they might be used in the future.[28]

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[24] Benton, Frame and Meredith, above n 20.

[25] New Zealand Law Commission, above n 10.

[26] Jones, above n 9.

[27] Mead, above n 3.

[28] For more discussion and scholarship Māori legal concepts, see Mamari Stephens and Mary Boyce (eds) *He Papakupu Reo Ture: A Dictionary of Māori Legal Terms* (1st ed, LexisNexis, Wellinton, 2013); and the Maori Legal Corpus <https://www.legalmaori.net/corpus>.

A. Whanaungatanga

Whanaungatanga is a fundamental principle at the "core of the [Māori] socio-political system."[29] It is derived from whakapapa | the kinship system within te ao Māori and is the organising principle of tikanga Māori.[30] The *Ko Aotearoa Tēnei* Waitangi Tribunal report described the connection between whanaungatanga and whakapapa, saying that whanaungatanga:[31]

> …describes relationships between people, between people and natural resources, even between related bodies of knowledge. In fact, all relationships of importance in mātauranga Māori are explained through kinship. That is why whakapapa (genealogy) is so important, it is the practical manifestation of the kinship principle.

The relationship between whanaungatanga and whakapapa is critical in te ao Māori. Whakapapa can be understood as the "structural sequencing of the universe by tying all things into a genealogical order"[32] across both space and time. Whakapapa is cosmological, describing the genealogy from Te Kore | the void of space and time, through Te Pō | the long darkness to Te Ao Mārama | the dawn of time from which the atua | deities Ranginui | the Sky and Papatūānuku | the Earth are descended.[33] Whakapapa is also divine, describing the descent of the atua from Ranginui and Papatūānuku including their children such as Tangaroa | god of seas, Tāwhirimātea | god of winds, Rongomatane | god of cultivated food and Tāne Mahuta | god of forests. And whakapapa is ancestral, describing the descent of all living things from those atua, including humans descended from Hine Titama, the first born human child of Tāne Mahuta and Hine-Ahu-One.

As I understand it, whakapapa is the genealogical, physical blood/kin connection that all things have with each other. Whanaungatanga is the relationships and obligations that arise from that physical, blood/kin connection. One common example of the expression of the link between whakapapa and whanaungatanga is when Māori people gather together for the first time or for

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[29] Maharaia Winiata "Leadership in Pre-European Society" (1956) 65 Journal of the Polynesian Society 212 at 221.

[30] Benton, Frame and Meredith, above n 20, at 524.

[31] Waitangi Tribunal *Ko Aotearoa Tēnei A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuatahi* (Wai 262, 2011) at 105.

[32] Paul Tapsell "The Flight Of Pareraututu: An Investigation Of Taonga From A Tribal Perspective" (1997) 106 Journal of the Polynesian Society 323 at 327.

[33] Te Rangi Hiroa *The Coming of the Māori* (Māori Purposes Fund Board, Wellington, 1949) at 433. Hiroa describes the three genealogical sequences as cosmogony – the creation of the cosmos and world; theogony – the creation of the gods; and anthropogeny – of human beings.

the first time in a while, we will often do "whakawhanaungatanga", where we will, one after another, introduce ourselves, identifying our kin connections to maunga | mountains, awa | rivers, moana | ocean, waka | origin canoe, tūpuna | ancestors well as our marae and where we live. This pepeha | formalised recitation describes the whakapapa of a person. For example, here is part of my pepeha:[34]

> Ko Tararua me Ruapehu ōku maunga. *Tararua and Ruapehu are my mountains.*
>
> Ko Ruamahanga me Whanganui ōku awa. *Ruamahanga and Whanganui are my rivers.*
>
> Ko Takitimu me Aotea ōku waka. *Takitimu and Aotea are my origin canoes*.
>
> No Rangitāne, Ngāti Kahungunu ki Wairarapa me Ati-Hau-nui-a-Pāpārangi. *I belong to the tribes of Rangitāne, Kahungunu in Wairarapa and Ati-Hau-nui-a-Pāpārangi.*
>
> No Ngāti Moe me Wainuiarua ōku hapū. *Ngāti Moe and Wainuiarua are my hapū*.
>
> Ko Papawai me Upokotauaki ōku marae. *Papawai and Upokotauaki are my marae.*
>
> Ko Teoti Rangitekaiwaho Turei me Piupiu Taputoro ōku matua tipuna. *Teoti Rangitekaiwaho Turei and Piupiu Taputoro are my grandparents.*
>
> Ko Richard Ropata Eruera Turei me Janice Turei ōku mātua. *Richard Ropata Eruera and Janice Turei are my parents.*

The pepeha is recited in order to create and restate whakapapa and whanaungatanga connections to the others in the room, clarifying familial relationships and tribal connections between the individuals. The practice of whakawhanaungatanga demonstrates the importance of the whakapapa/whanaungatanga connection to them and how easily Māori reflect that connection in our daily lives.

Whanaungatanga therefore "embraces whakapapa and focuses upon relationships"[35] that extend beyond the familial into relationships with the natural world and the spiritual world. It is the broad organising principle that sets out "rights, responsibilities and expected modes of behaviour".[36] It has been described as "the glue that held, and still holds, the system together:

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[34] My pepeha, describing my kin relationships and descent lines.

[35] Mead, above n 3, at 32.

[36] Benton, Frame and Meredith, above n 20, at 524.

the idea that makes the whole system make sense – including *legal* sense."[37] Tā Williams[38] and Tā Durie[39] have both described whanaungatanga as giving rise to legal obligations within Māori law.

Whanaungatanga is not a legal principle that operates as a rule that can be broken. It is a desirable standard of responsibility that should be meet and actively maintained. I suggest that whanaungatanga plays a role in the Māori legal tradition similar to the role that justice plays in the Pākehā state legal system. It is a broad encompassing term that expresses the ultimate value held by the community about what the law should achieve, or repair if required. Whanaungatanga has multiple layers of meaning so it cannot be easily defined but the broad roles of this principle can be identified and applied.

One role of whanaungatanga is to structure the decision-making process for how the principles of the Māori legal tradition should be applied. Whanaungatanga, along with mana and rangatiratanga, determines the status and roles of individuals within a whānau, hapū or iwi. People participate in Māori decision-making bodies to resolve breaches of Māori law depending on their status and roles. These decision-making bodies include rūnanga | council of decision makers[40] to engage in a whakawā | adjudication process[41] to decide whether a breach of a principle has occurred and what action should be taken to achieve ea | resolution. Whanaungatanga is also the organising principle for who would attend hui | gatherings[42] of the broader whānau, hapū or iwi to discuss the adjudication of the breach. These two assemblies, rūnanga and hui, help the whānau, hapū or iwi to understand how, in any given case, a legal obligation may apply; to confirm whether an obligation is breached; and if breached, how utu | balance can restore the whanaungatanga between the parties. The legitimacy of the outcomes from these hui | gatherings and hui is dependent on the mana of the participants. That does not mean a process or decision is recognised as just by everyone present – it may lead to further acts of retribution or appeals or any number of consequences. But all those processes would be managed with reference to whanaungatanga as both a principle of Māori law and a process for managing Māori legal issues.

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[37] Williams, above n 5, at 4.

[38] At 4.

[39] Durie, above n 2, at 455.

[40] Benton, Frame and Meredith, above n 20, at 343.

[41] At 520.

[42] At 97.

Another role of whanaungatanga is determining how a person's status, mana or rangatiratanga is understood.[43] Whanaungatanga can identify a person's right to use natural resources by confirming their take tūpuna | ancestral rights and connections.[44] Those rights include the right of the person and their whānau to access those resources, and what rights they have to exploit, distribute, and share those resources.

Identifying these rights and obligations is important because natural resources have always been a core source of the wealth of whānau and hapū. Their ability to share that wealth, through manaakitanga, is critical to their mana.[45] If resources were taken through take raupatu | conquest by the war club or tuku | transfer, balance was restored by intermarriage to create the whakapapa line to legitimise future access to the resource for that whānau or hapū.[46] Non-blood related relationships could be turned into close kin ties that created reciprocal whanaungatanga responsibilities such as kaitiakitanga.[47] Whanaungatanga operates to confirm contractual agreements and resource allocations into the future. It is a principle that performs a complex multidimensional role across social, spiritual and economic relationships within te ao Māori.

B. Kaitiakitanga

Kaitiakitanga is commonly understood as the ethic of guardianship or trusteeship of natural and other physical resources.[48] The kupu itself is constructed from kai | person or agent, tiaki | care, guard or watch over and tanga | time, place or circumstance.[49] The kupu has become widely used in Aotearoa New Zealand's political and legal discourse because of its inclusion in section 7 of the Resource Management Act 1991 and its definition in section 2 of that Act:[50]

> Kaitiakitanga means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship.

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[43] At 455.

[44] Williams, above n 5, at 4.

[45] Durie, above n 2, at 455.

[46] Williams, above n 5, at 5.

[47] Durie, above n 2, at 454.

[48] Benton, Frame and Meredith, above n 20, at 105.

[49] At 105.

[50] Section 2(1) of the Resource Management Act 1991.

However, kaitiakitanga is a much deeper principle than the care and protection of natural resources. It is a principle that stems directly from whakapapa and concerns both tangible and intangible whānau relationships across time and generations. Kawharu says that kaitiakitanga is an ethic not only found in the "biophysical environment".[51] The concept of sustainability incorporated in kaitiakitanga is an activation of the kaitiaki | trustee responsibilities to people individually and collectively, to the natural environment and its creatures, to the atua | deities and to the ancestors.[52]

Kawharu says there are three spheres of kaitiaki responsibility that need to be kept in balance with each other – mana whenua | territorial responsibility, mana tangata | human realm of responsibility and mana atua | spiritual realm of responsibility.[53] Kaitaiki have a range of tools and authorities to draw on to meet this responsibility for balance. One of those tools is the exercise of rangatiratanga, the authority for identifying and protecting land and waters, and political boundaries between groups.[54] This can include identifying and protecting waahi tapu | sacred sites and imposing rāhui | ritual prohibition over land, rivers, the ocean and other natural resources to protect them from depletion. Rāhui can also be used by kaitiaki to protect the living from the dead, for health and spiritual reasons.[55]

The spiritual dimension of kaitiakitanga also means that is not a human-bound concept. Different species can be kaitiaki over a place providing spiritual shelter, issuing warnings of dangers and generally caring for the community.[56] Kaitiakitanga extends to the protection and care of taonga | sacred objects where those objects have become tapu.[57] Kaitiaki may also be responsible for acts of manaaki | hospitality, particularly where that involves using natural resources, such as use, access to or gifting of land, food or taonga.

As we have seen in the discussion on whanaungatanga, the Māori kinship system utilises the concept of reciprocity as a core tool to maintain the political and legal relationships between people, people and the atua, and people and the natural environment.[58] Kaitiakitanga can be

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[51] Kawharu, above n 18, at 352.

[52] At 352.

[53] At 355. These categories of mana will be discussed in more detail under the "Mana" heading on page 87.

[54] At 353.

[55] Benton, Frame and Meredith, above n 20, at 311.

[56] Waitangi Tribunal, above n 31, at 23.

[57] At 105.

[58] Winiata, above n 29, at 221.

considered an exercise of whanaungatanga because of the intergenerational caring obligation created by whakapapa.[59] Kaitiakitanga is an application of kinship reciprocity across both time and place.[60] This, I suggest, is what makes kaitiakitanga an important legal principle.

Kawharu says that kaitiakitanga is:[61]

> a fundamental means by which survival is ensured—survival in spiritual, economic and political terms. Since Maori society is a tribal society with respect to relationships with environmental resources, their actual management is itself a constituent element in the tribal kinship system.

The management of natural resources by the kaitiaki includes restricting access, using rāhui to prevent overuse or misuse of food, and the distribution of resources through manaaki and tuku | gifting. These are legal obligations that the kaitiaki has towards and exercises on behalf of the responsible collective. Tuku is a useful example, as it is a kaitiakitanga responsibility related to the gifting of land. The gifting of land (or other natural resources) can be temporary or permanent but comes with reciprocal obligations on the giftee.[62] That reciprocal obligation could be paid by later generations, as its purpose is to create the relationship of obligation between the parties while also ensuring natural resources are used carefully and wisely.[63] The giftee would acquire the kaitiakitanga responsibilities but the donor would retain the mana over the land.[64] I suggest that these reciprocity tools operate as legal agreements within Māori law for the use, sharing and return of land and resources. There would be spiritual and practical consequences for breaching the agreements, such as muru (discussed below) or breaches of tapu.

C. Manaakitanga

Manaakitanga is a process that builds the authority or status of a person, whānau or collective through giving.[65] Manaakitanga is often discussed in relation to hosting manuhiri | guests as an

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[59] Waitangi Tribunal, above n 31, at 105.

[60] Kawharu, above n 18, at 353.

[61] At 351.

[62] At 361.

[63] Benton, Frame and Meredith, above n 20, at 444.

[64] At 361.

[65] Kawharu, above n 18, at 360.

act of kindness and generosity that reflect well on the host group.[66] Tā Mead describes how a host group may take months to prepare for an event or visitors, to satisfy themselves that they have meet their manaaki obligations.[67] Manaakitanga is both a demonstration and an affirmation of kinship across the levels of whanaungatanga. Tā Durie describes manaakitanga as the "reciprocal enhancement of each other" in the management of relationships, that is the enhancement of the "mana of others" by "words and by demonstrative acts showing love, generosity and care."[68]

Manaakitanga is a concept that extends beyond hosting, feeding and caring for manuhiri, however. It is a two-way kinship relationship that uses generosity and hospitality to exercise the economic and political power of the giver though the careful attention to the needs and requirements of others. *Te Mātāpunenga* recounts this extract from J Prytz Johansen's *The Maori and his Religion in its Non-Ritualistic Aspects* which describes how manaaki was used in this case for political kinship purposes:[69]

> During the Maoris' fight with the aborigines a young woman among these was taken prisoner by Toikairakau. When the girl's father, Pohokura, heard this, he went to Toikairakau and asked that she might be released so that she might return with him. Toikairakau answered, "She has my leave. When you take her to your home, let her be named Kairakau" (thus part of his own name, Toi-kairakau). Pohokura said, "It is well! But now you have mentioned yourself as a name for her take her; for your wife as well; for I understand that my child is honoured (manaakitia) by you."
>
> When giving his name, he gives something of himself; he creates mana, exactly what is called manaaki, to honour. At the same time, he becomes greater himself, as the girl gets part of his life. Therefore it is quite natural that the father should offer her as Toikairakau's wife. Indeed, she did get married, although not to Toikairakau, as the latter intended her for his grandson.

In this example, Toikairakau demonstrated manaaki towards Pohokura, in agreeing to Pohokura's request for the return of his daughter. As Johansen has described, in renaming the girl a gift of a name was given and accepted, enhancing the mana of all parties. In addition the

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[66] Mead, above n 3, at 104.

[67] At 19.

[68] Durie and others, above n 1, at 18.

[69] Jørgen Prytz-Johansen *The Maori and His Religion in Its Non-Ritualistic Aspects* (HAU, London, 2012) at 115, as cited in Benton, Frame and Meredith at 208, n 20.

gift created a future whanaunga | relation obligation between the two whānau, leading to the girl being married into Toikairakau's whānau at some later time. The whanaungatanga connection connects the resources that come both from the mixed lineages as well as obligations such as coming to each other's aid during conflicts. This act of manaakitanga is as much an economic and political act as it is one of personal generosity.

Manaakitanga is also a process that enables some of the more difficult legal processes, such as muru | compensation, to occur in an acceptable and orderly fashion. A muru is the ritual redistribution of wealth or property in compensation or as a punishment for an offence.[70] A hapū subject to a muru would be required by the principle of manaakitanga to host the muru party even as the compensation was being extracted.[71] This is can be understood within the context of whanaungatanga, because the purpose of utu or muru is to restore the whānau relationships and connections injured by the hara | wrong committed in the first instance. The act of manaakitanga, even as the consequence is exacted, is a contribution to the restoration of mana of the host and of the whanaunga relationships between the host and the muru party.

I suggest the examples above demonstrate an important, if underrated, legal understanding of manaakitanga, as an economic and political tool which creates binding rights and obligations. The act of giving creates concomitant obligations on the receiver, similar in nature to a contract in state law. There is a process of exchange, an understanding of the relative value of the first gift of exchange and therefore the value of the return obligation. There are implied and possibly explicit understandings of the consequences of a failure to reciprocate appropriately. Manaakitanga can be understood as a legal process as well as a social and familial one.

D. Mana

Mana is a concept with a wide application. It is a personal quality of the individual and includes the power or charisma of a person. Mana refers to the place of the individual within the collective and is one of the two core principles that are focused on the individual – the other is tapu.[72] Mana is the exercise of power or authority over features of the whakapapa, including land, water, resources and property. It is used to describe the political power and therefore the

[70] Mead, above n 3, at 395.

[71] At 33.

[72] At 33.

legal authority, wielded by high-status individuals such as chiefs and tohunga in making determinations and declarations over and for the whānau, hapū or iwi.[73]

Tā Mead says that everyone is born with mana and inherits mana from the status of their whānau and parents. It is derived from and signals the inherent status of a person. However Tā Mead also says that mana is "much more open to extension than any other attribute"[74] because it can be enhanced or diminished by the actions and achievements of that person. It is dynamic and creative and rewards personal excellence.[75] The mana achieved by excellence can also then be inherited or ascribed to the descendants or the whānau of that person. It is a means to value personal strengths within a world view deeply focused on the wellbeing of the group.

Mana is a complex principle, expressed through the whakapapa relationships that individual and whānau Māori have with the spiritual and physical world. It also has specific and comprehensive use across a number of legal areas. Benton, Frame and Meredith identify mana kōrero, mana moana, mana motuhake, mana tangata, and mana whenua.[76] Tā Mead includes mana atua, mana moana, mana tangata, mana tipuna, and mana whenua.[77] Barlow describes mana atua, mana tūpuna, mana whenua and mana moana.[78] For the purposes of this thesis, I will not describe these aspects in detail but rather provide a general overview grouped according to Tā Rangi Hiroa's classification of te ao Māori as theogony – the creation of the gods; anthropogeny – the creation of human beings; and cosmogony – the creation of the cosmos and world.[79]

1. Theogony – mana atua, mana tūpuna

Mana atua is the spiritual authority descended directly from the atua and to which every child is heir.[80] Mana atua can describe a "bundle of attributes" of a child or a person that require others to take particular care to nurture and protect.[81] While mana is innate due to the

[73] Benton, Frame and Meredith, above n 20, at 156.

[74] Mead, above n 3, at 56.

[75] At 57.

[76] Benton, Frame and Meredith, above n 20, at 161–204.

[77] Mead, above n 3, at 8 and 395.

[78] Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1991) at 61.

[79] Hiroa, above n 33, at 433.

[80] Mead, above n 3, at 65.

[81] At 66.

whakapapa between the person and the atua, mana can be personally acquired or diminished, interfering with or enhancing their whakapapa relationships with the spiritual world.

2. Anthropogeny – mana tangata, mana kōrero, mana mohutake

Mana tangata is a description of the legal authority to govern people. A person with sufficient mana will hold decision making authority over different aspects of Māori community life and people. It is an authority that can be whakapapa based or achieved by leadership excellence.[82] Mana kōrero is a similar authority, the right to speak on behalf of others. The term recognises the oratory skills of the person to articulate the views and needs of their whānau, hapū and iwi.[83] Mana motuhake is concerned with the right to autonomy. It has become more of a political term often used in relation to Māori assertions of tino rangatiratanga at an iwi or national level and so is more commonly applied to collectives rather than individuals.

3. Cosmogeny – mana moana, mana whenua

Mana moana and mana whenua are descriptions of Māori legal authority from and over water and land. There is divergence among scholars as to the traditional legitimacy of these concepts. For example, Tā Mead refers to Meredith's 2010 analysis of mana moana as a creation of the Māori Land Court rather than an original conception of authority over water,[84] suggesting in effect that a claim of mana moana is only necessary for dealing with state attempts to take land covered by water. However, the concept of mana moana is considered an origin concept by Tā Durie and others, who write that, for Māori "their water bodies, … the open seas and the hot-water rivers and springs, are integral, defining parts of their personal and tribal identity, security and prosperity."[85] The exercise of that tribal identity has come to be better understood as the exercise of mana or decision-making power of the water and the land and is closely connected to the exercise of kaitiakitanga. In the Waitangi Tribunal *Mohaka River* report, Canon Huata described the two-way mana relationship between Ngāti Pahauwera and the river:[86]

> We always talk about our river, the control of it, and its spirituality. These are the waters of sustenance.

[82] Benton, Frame and Meredith, above n 20, at 176.

[83] At 161.

[84] At 303.

[85] Durie and others, above n 1, at 20.

[86] Waitangi Tribunal *The Mohaka River Report 1992* (Wai 119, 1992) at 18.

> Even though administration of the river and the land has passed into pakeha hands, we retain the control. It is these treasures (i.e. the land and the river) that rests the mana. This is what we are fighting for. We know that this is where our salvation is. The control of the river has been our mana from way back. It came from our ancestors and down through the generations. Even though these things have been taken, we stand firm (in our belief). Tawhirirangi is the mountain, Mohaka is the river, etc, etc.
>
> Our ancestors discovered the mana. They found the mana in the hills, in the rivers, and that is why we battle for their return.

Mana whenua is a complex concept of decision-making authority over land. It conveys a reciprocal relationship with land that includes rangatiratanga | political responsibilities, kaitiakitanga, ahikā | descent rights to occupy[87] and wealth creation through the use and protection of natural resources such as food and fresh water. Angela Ballara, in her book *Iwi,* describes mana as resting or lying over the land, such that the rangatira:[88]

> did not own everything in his territory, but while he was accepted by his people as the proper bearer of the mana he had the right to make decisions about both the land and the various hapū living under his mana or authority.

Tā Mead lists a comprehensive set of requirements for the establishment of mana whenua when needing to test land or Treaty of Waitangi claims in a court or for settlement with the Crown.[89] He says that mana whenua can be acquired through many legal means including take raupatu | conquest, by discovery, by gifting, or by whānau distribution. These initial forms of taking or acquiring land are often confirmed through take moe whenua | marriage confirmation, as the "hau (spiritual essence) of the land rests with the women of the land".[90] The retention of mana whenua relies heavily on ahikāroa | title by occupation. The land needs to be settled, lived on and cared for by the whānau, hapū or iwi for several generations to claim ahikāroa. Mana is core to the Māori legal tradition because it is one of the principles that confers authority over resources and people.

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[87] Benton, Frame and Meredith, above n 20, at 178.

[88] Angela Ballara *Iwi* (Auckland University Press, Auckland, 1998) at 204.

[89] Mead, above n 3, at 306.

[90] At 306.

E. Rangatiratanga

Where mana can be said to be the inherent authority held by a person, from whatever source, rangatiratanga is the exercise of acquired or attributed leadership authority. Tā Mead notes that it is more natural to talk about the mana of the individual than the 'rangatiratanga' of a person unless that person holds an identified leadership, nobility or chiefly role.[91] The kupu 'rangatiratanga' refers to the process of ranga i te tira – binding people together[92] indicating that the exercise of this leadership is about caring for the collective as opposed to self-promotion. It is a fundamentally political principle, indicating the political authority of a person or group to act with their "sovereignty, chieftainship, leadership, self-determination, [and] self-management".[93] Rangatiratanga sits at the heart of Te Tiriti o Waitangi. 'Tino rangatiratanga' is the term used in Article 1 of Te Tiriti o Waitangi and is understood by Māori to mean that the rangatira who signed te Tiriti would retain 'full chiefly authority' within te ao Māori, including over their people and their land. The kupu has subsequently become a politically contentious term in the negotiations and settlements between iwi Māori and the state.

Rangatiratanga is a kupu that is used more frequently by the state in iwi settlement legislation to denote the authority, autonomy and sovereignty of Māori.[94] Jones notes that the use of this kupu is not consistent in these settlements, sometimes used in conjunction with mana or motuhake | independence, other times not.[95] But presumably iwi Māori are intending or at least accepting the use of this kupu in their settlements to denote their political authority.

Barlow takes a contrary view about the use of the kupu 'rangatiratanga' as meaning Māori political authority. He says that 'tino rangatiratanga' is not a kupu that has a source in the whare wananga and therefore should not be used to mean Māori political authority.[96] He considers the right kupu is 'ārikitanga' as it directly connects the authority of the individual to their whakapapa derived from the atua:[97]

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[91] At 43.

[92] Benton, Frame and Meredith, above n 20, at 328.

[93] Mead, above n 3, at 41.

[94] Jones, above n 9, at 103.

[95] At 103.

[96] Barlow, above n 78, at 131.

[97] At 131.

> The ariki is the supreme authority and power of the tribe or group, by virtue of his or her direct lineage to the gods in accordance with human genealogies. The ariki is also the intermediary of the gods on earth.

In my view, Barlow's opinion that 'ārikitanga' is the best kupu to describe Māori political authority is compelling because of its basis in the theogeny of te ao Māori. However, it is not the kupu that is routinely used to describe political power in te ao Māori in contemporary times. I will continue to use the kupu 'rangatiratanga' because it is commonly understood by New Zealand legal audiences, including Māori, and I recognise its limited interpretation. In doing so I defer to the position of Tā Durie:[98]

> As noted tino rangatiratanga subsumes the ideas underlying proprietary rights in that the Māori concept envelopes both a political conception of authority as well as rights attached to resources, including rights to exclusive possession and use. In short, tino rangatiratanga encompasses both political authority and proprietary rights.

This interpretation does not confine the exercise of rangatiratanga to those circumstances that involve the state government or some state intervention, such as co-ownership or co-governance. It acknowledges Māori-determined political intent as well as legal decision-making authority over property. In Chapter 2, I described how the colonisation process undermined Māori political authority and therefore the operation of Māori law and the intellectual and cultural tradition that maintained that law. It is possible that the improved recognition of rangatiratanga and its assertion by iwi in Treaty of Waitangi claim settlements, is contributing to an improved recognition of the Māori legal tradition that would naturally follow from Māori political autonomy. This is not a question that this thesis is designed to answer but it is an interesting question that arises from it.

F. Utu

Utu, described as one of the "most important ordering principles" in te ao Māori[99] means to make a response, to balance or provide reciprocity in some form. It can include compensation,

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[98] Durie and others, above n 1, at 68.

[99] Joan Metge and Edward Taihākurei Durie *Tuamaka: The Challenge of Difference in Aotearoa New Zealand* (Auckland University Press, Auckland, 2010) at 18.

payments, and answers as well as revenge or ransom or reward.[100] Despite a common understanding of utu as revenge, it is more closely associated with the concept of ea, which is the resolution and restoration of relationships – demonstrating a purpose directly linked to whanaungatanga. Utu then is a core means by which whanaungatanga is restored where a hara | harm or breach of Māori law has occurred.

Tā Mead uses an analytical framework of 'take-utu-ea' to describe the use of utu in te ao Māori.[101] The breach of tikanga is the take – the issue or harm which requires addressing. In a process of whakawā | determination, it is expected that the wronged and wrongdoing parties agree to the nature of the take. Then utu, the appropriate recompense or restoration, is agreed. Once the utu is completed, the relationships between the parties is in a state of ea or resolution. This 'take-utu-ea' framework is a legal framework, like an investigation, determination, and restitution process one might understand in a state legal system. It is an example of how people will work together to create a conflict management system to help regulate and manage relationships – as law is designed to do.[102]

Frame and Benton also understand utu in this more complex, multi-layered way. Utu incorporates dowries, revenge, compensation, consequences, and importantly gift giving and reciprocity.[103] Piri Sciascia described utu in a similar way, reflecting on utu as a commentary on the way in which Māori artists see and comment on their world around them:[104]

> Central to the work of the creative artist is a human quality which has been highly valued in Māori society. This value is utu, at turn which is generally understood to mean "revenge", but an equally important part of its meaning is "to respond" or "to make response". It is a value central to Māori life and a Māori way of living. It is a spiritual course which when fully valued leads to an expression of life that is demanding, engaging, open, spontaneous, and above all personal.

One of the legal practices that can be used to achieve utu, is muru. It closely connected to manaakitanga as described earlier in this thesis.[105] It is a means to redress a harm or correct an

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[100] Benton, Frame and Meredith, above n 20, at 467.

[101] Mead, above n 3, at 31.

[102] Val Napoleon "Ayook: Gitsan Legal Order, Law and Legal Theory" (PhD Thesis, University of Victoria, 2001) at 1.

[103] Benton, Frame and Meredith, above n 20, at 472.

[104] Piri Sciascia "Ka Pu te Ruha, Ka Hao Te Rangatahi" in Hirini Moko Mead (ed) *Te Maori: Maori Art from New Zealand Collections* (Heinemann Publishers (NZ), Auckland, 1984) at 161.

[105] See page 86 of this thesis on the connection between manaakitanga and muru.

action without the use of violence.[106] Muru can be a spiritual consequence but is more commonly understood as the transfer of property in compensation or damages.[107] Muru could also be used to dissolve a marriage, presumably as a means to compensate for the ending of a marriage contract.[108] Muru is a social institution, in that for its successful resolution, the parties must participate and recognise that it has occurred in a just manner.[109] Just as with manaakitanga, the purpose of utu and its mechanisms, such as muru, is to restore whanaungatanga. Therefore, participation by those affected is essential for its success.[110] Who participates in the muru process is determined by seriousness of the offence and who the offence is committed against. The more serious the offence or the more chiefly the person injured by the offence, the more likely the wider hapū or iwi will be involved.[111] Tā Mead also recognises that muru operates as an economic tool, circulating property through whānau and hapū as well as operating as a social control against unwise or unacceptable behaviours.[112] The principle of utu as a legal tool in restoring whanaungatanga is very important and is encapsulated in its complex meaning and use. In a society where whanaungatanga is essential to the wellbeing and economy of whānau, hapū and iwi, a system of reciprocity that reduces conflict and damage (such as violence against a person, group or property) is very wise.[113]

G. Tapu

Tapu first and foremost is a spiritual power that is imposed on people, places and things. It was described by Donald McClean in the 1860s as an 'institution that has had the force of law' with rangatira exercising a spiritual power to both place and lift tapu as they considered necessary.[114] Cleve Barlow describes tapu as most critically the 'power and influence of the gods'[115] while Tā Mead describes it as "everywhere in our world", in people, places, things, buildings, kupu

[106] Benton, Frame and Meredith, above n 20, at 254.

[107] Mead, above n 3, at 161.

[108] Benton, Frame and Meredith, above n 20, at 259.

[109] Mead, above n 3, at 170.

[110] At 170.

[111] Jones, above n 9, at 39.

[112] At 173.

[113] Jones, above n 9, at 75.

[114] Benton, Frame and Meredith, above n 20, at 405.

[115] Barlow, above n 78, at 128.

and ‘in all tikanga’. It is the inherent quality of value and integrity in all things and in all ways of being Māori. Tā Mead says for example how the tangihanga | funeral cannot be understood unless tapu is understood.[116] As such it forms a core part of how Māori society understands and values the spirituality of all things.

For some early commentators the spiritual aspects of tapu were seen to be more negative and superstitious,[117] where others understood it not just for its spiritual aspects but also for its practicality:[118]

> Compared with some of our modern practices – legal, social and hygienic – it seems to have been constructed upon the keystone of common sense and expediency. Four single instances indicate that there was always good reason underlying the tapu. The Maori tapu of dead bodies was the precursor of our modern law against sacrilege and defilement of dead bodies. The Maori tapu of sick persons was the forerunner of our current law of quarantine and isolation of infected persons. The Maori tapu of woman to man was merely an early law of the sanctity of matrimony. The Maori tapu of seed was a primitive form of protecting property.

Tapu can be understood as a principle conferring binding obligations to respect the inherent value and dignity of all things and their relationships within te ao Māori. Tā Williams describes it as both a social control on behaviour and evidence of the indivisibility of divine and profane.[119] Maori Marsden has said the concept of tapu has both legal and religious aspects.[120] He considers that when tapu is attached to a person, it expresses a relationship between that person and a deity such that it constitutes a legal contract. This is a contract in the sense that the person “dedicates himself or an object to the service of a deity in return for protection against malevolent forces”[121] This leads to a set of rights and responsibilities in the ways in which that person, whānau, hapū and iwi give weight to their relationships of tapu.

For example, following Tā Mead, we can consider how the Māori law of tapu might apply to the rights of a person to be free from violence, harm and coercion. Tapu can be understood as

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[116] Mead, above n 3, at 35.

[117] Elsdon Best “Omens and Superstitious Beliefs of the Maori: Part 1” (1898) 7 Journal of the Polynesian Society 119 at 119.

[118] Percival R Waddy “Early Law and Customs of the Maoris” (LLM Thesis, Sydney, 1927) at 21, as cited in Benton, Frame and Meredith at 415, n 2.

[119] Williams, above n 5, at 3.

[120] Te Ahukaramū Charles Royal *The Woven Universe* (Estate of Rev Maori Marsden, Otaki, 2003) at 5.

[121] Jones, above n 9, at 74.

the inherent dignity of a person, their social, spiritual, physical, and intellectual integrity, right to self-determination, to be free of abuse or interference and to have an inherent right to belonging and connection to whānau, hapū and iwi.[122] Incursions on a person's tapu would be subject to a Māori legal process to determine the extent of the incursion and its consequences, what form of utu was appropriate, and how ea could be achieved.

The law of tapu creates binding rights and responsibilities on Māori people in their dealings with every aspect of te ao Maori. The law regulates their relationships with the atua | deities, which includes steps they need to take, such as karakia | ritual chant, that bind the person and the atua together in a spiritual contract. Tapu protects the integrity of the person against incursions by other people. This creates an obligation on others to not hurt or injure another person and to be prepared to face practical and spiritual consequences if they do.

IV. He Mutunga

In this chapter I have sought to more deeply understand the values of tikanga Māori and how they are used as foundational principles of the Māori legal tradition. I have considered, in detail, seven principles – Whanaungatanga, Kaitiakitanga, Manaakitanga, Mana, Rangatiratanga, Utu and Tapu. These principles contain norms understood by Māori to set standards of behaviour and that, if contravened, can lead to a form of "serious social disadvantage"[123] to themselves and others. They can therefore be understood as legal principles that form the foundation of the Māori legal tradition.

This legal tradition implements political, social and spiritual institutions or regularised practices such as ahikāroa, muru, rāhui, hui and rūnanga that establish the processes and procedures of law. It is a dynamic and complex legal tradition. It is, as Durie has said in the opening quote to this chapter, aspirational, setting standards of outstanding performance, rewarded by the mana that comes with meeting and then exceeding the whanaungatanga obligations a person has to their whānau, hapū, iwi, tūpuna and atua.[124]

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[122] Mead, above n 3, at 39.

[123] Benton, Frame and Meredith, above n 20, at 14.

[124] Durie and others, above n 1, at 8.

It is with this understanding, that I move to consider in the next chapter how whakairo Māori can be encoded objects that document Māori law.

Te Wāhanga Tuaono – Whakairo Māori

> "A lump of wood of little or no great significance is transformed through the art process, by building words (kōrero) into it and by contact with people, into a thing Maoris class as taonga, he taonga tuku iho…. a highly prized object that has been handed down from the ancestors… Implied is the notion of *he kupu kei runga*, – there are words attached to it."[1]

In this chapter I bring together the previous analyses on visual literacy, encoded objects and Māori law to consider whether the visual language of Māori law can be encoded into whakairo Māori. I consider how the principles of the Māori legal tradition may be read in tā moko | tattooing, pou whenua | land marker posts and raranga | weaving and how each might be encoded with law. This chapter thus forms the crux of my thesis inquiry.

I. The Role of Whakairo Māori

As explained in Chapter 1, I have used the phrase 'whakairo Māori' throughout this thesis as a general term for Māori visual art. Whakairo means to ornament with a pattern, and it is most often used in relation to carving but not strictly so.[2] The phrase "Whakairo Māori" can be used to refer to carving, tattooing, weaving, painting and other art forms. Tā Mead says that whakairo Māori "refers to something more than the shape and form of an object".[3] These objects have an added wairua or purpose than more simple decorative or functional uses:[4]

> Whakairo is quality, the difference between crudity and elegance, animal and human, nature as opposed to culture. It is uplifting, taking the human spirit close to the rarefied and beautiful world of the gods and rising above the mundane affairs of existence in mere survival. It is closer to Rangi, e tu nei (Rangi [Sky God], standing above) than to Papa, e takoto nei (Papa [the Earth Mother], lying here). Whakairo

[1] Hirini Moko Mead *Te Maori: Maori Art from New Zealand Collections* (Heinemann Publishers (NZ), Auckland, 1984) at 21.

[2] At 21.

[3] At 21.

[4] At 22.

> represents the triumph of mana Maori [power] over the environment and represents a gift from the ancestors to their descendants born and yet unborn.

Tā Mead says the purpose of a culture's art system is to provide a 'cultural grid' that mediates the relationships between the person, the atua and the whānau, hapū and iwi:[5]

> As Rudolph Arnheim suggested (1961:205), art "helps men to understand the world and himself and presents to his eyes what he is understood and believed to be true. Some very fundamental truths are reflected in art, truth to do with religion, philosophy, in mythology. Forge (1979:285) indicated that the sorts of truth conveyed in art "are fundamental assumptions about the bases of the society, the real nature of men and women, the nature of power, the place of man in the universe of nature which surrounds him."

Whakairo Māori are not merely descriptions of the natural world, but are often purposeful non-written visual communications between people, between people and their atua | deities and the environment. Whakairo Māori can be encoded objects, made to kōrero | speak with us so we can move knowledge forward through the generations.[6] Panoho's description of the relationship between the Māori artist, their whakapapa and the whenua | land as a palimpsest encourages a multi-layered reading of the objects and their relationships.[7] Panoho's work is an exploration of how Māori artists navigate their relationships with Papatūānuku, describing tatai | links that are integral to an understanding of their art:[8]

> Land, along with tātai connecting ancestors to land, help make people belong. The reason this is of interest to the broader discussion of Māori art as a palimpsest is that in a number of key sites throughout Aotearoa many different groups can and do claim ngā piringa 'associations' with different layers in the same land. Outdoor sculpture, meeting houses and references by artists to the landscape, natural environment, culture, taonga and to the histories of these sites helps illustrate the complexity ēnei whakapapa 'these layers' of connection.

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[5] At 25.

[6] Sherry Farrell-Racette "Encoded Knowledge: Memory and Objects in Contemporary Native American Art" in Nancy Marie Mithlo (ed) *Manifestations: New Native Art Criticism* (Museum of Contemporary Native Arts, Santa Fe, NM, 2011) 40 at 43.

[7] See page 53 of this thesis on Panoho's use of palimpsest in relation to whakairo Māori.

[8] At 40.

These layers of connection are not just about the environment in which Māori artists are working and from which they draw inspiration. They also include the materials and tools the artists use which, Panoho says, have a whakapapa basis:[9]

> the whakapapa of paint [as the] toto 'blood' that comes out of the wehenga 'separation' of Rangi and Papatūānuku. With the kōkōwai 'red ochre' you still see the veins of Papatūānuku. If they have carved out roads [i.e. scarp cut] you can see the veins running.

Panoho recounts a conversation with the late Hirini Melbourne about the stone, bone and wood instruments that Melbourne found in museums. In that conversation, Melbourne described those instruments as mokemoke | lonely and lacking the activation of breath and warmth that comes from their use. Panaho reflects that:[10]

> the tone of [the object's] speech is inherent; it comes out of the material and cavity-contained shape lovingly crafted by maker. My impression of the revival Melbourne (and Richard Nuns (b.1945) who worked with him) was undertaking was actually a form of whakawhanaungatanga 'process of establishing relationships'. He was deliberately attempting to adopt and reintegrate the instrument back into its musical family.

All things in te ao Māori are kin-related including creative works. The creative process derives from, and serves the people and the atua | deities:[11]

> We the living ... are the Whatu-ora, the living, seeing eyes of our sleeping ancestors ... We the living are the tukutuku ngā iho "those that follow on".

Whakairo Māori has whakapapa to the tūpuna | ancestors and atua | deities. There is also a whakapapa connection between whakairo Māori and the people who that whakairo serves. It is part of a 'cultural grid' that enables a conversation between Māori people, our atua and our environment. The creation of whakairo Māori can be a 'taonga tuku iho', a treasure from the ancestors, able to be read and to speak about the values of tikanga Māori. It is a multi-layered communication tool that can be used to navigate layers of relationships. Māori scholars clearly connect whakairo Māori to the principle of whanaungatanga. As a communication tool, whakairo Māori could be also used to communicate other principles of the Māori legal

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[9] At 65.

[10] At 278.

[11] Waitangi Tribunal *Te Rōroa Report* (Wai 38, 1992) at 4.

tradition. I will now look more closely at tā moko | tattooing, pou whenua | land marker posts and raranga | weaving, to see whether other legal principles might also be encoded in some form. This process will test my theory that Māori law can be documented in whakairo Māori.

II. Tā Moko as Encoded Law

Tā moko is the art of tattooing marks into the body, particularly the face but also the legs, body and arms. Tā moko is and continues to be used by Māori as a statement of whānau, hapū and iwi identity.[12] It is a critical visual tool in te ao Māori, "part of the whole fabric of Maori culture" in signifying status and commitment to a Māori way of being.[13] The kupu | word moko is said to derive from Rūaumoko, god of earthquakes, who resides in Rarohenga | underworld. The most common origin story for how tā moko came from Rarohenga to Te Ao Turoa | world of light is that of Mataora and Niwareka. I summarise this origin story below as described by Rawinia Higgins.[14]

Mataora was a rangatira | chief who lived in Te Ao Tūroa | the world of light. One night, Mataora was wakened by a group of tūrehu | fairy from Rarohenga who had gathered around Mataora thinking that he might be a supernatural being. Mataora and the tūrehu performed songs for each other. When a tall, fair-haired woman of the tūrehu was dancing, the tūrehu began chanting her name "Niwareka, Niwareka". Mataora fell in love with Niwareka and they eventually married. One day Mataora struck Niwareka across the face in a rage. Niwareka fled back to her homeland in Rarohenga and Mataora, overcome by guilt and love for Niwareka, set off to find her.

On his journey to the underworld, Mataora encountered tīwaiwaka | fantails who said they knew why his wife had returned to Rarohenga. Mataora was full of whakamā | shame for his

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[12] Ngārino Ellis "Ki tō ringa ki ngā rākau ā te Pākehā? Drawings and Signatures of Moko by Māori in the Early 19th Century" (2014) 123 Journal of the Polynesian Society 29 at 30.

[13] At 30.

[14] Rawinia Higgins "He tanga ngutu, he Tuhoetanga te mana motuhake o te tā moko wahine: The Identity Politics of Moko Kauae" (PhD Thesis, University of Otago, 2004) at 33. In her account of the Mataora and Niwareka history of tā moko, Higgins references Anthony Alpers *The World of the Polynesians – Seen through Their Myths and Legends, Poetry and Art* (Oxford University Press, Auckland, 1987); Elsdon Best *The Maori* (Vol 1, Memoirs of the Polynesian Society, Wellington, 1924); Percy S Smith *The Lore of the Whare-wananga or Teachings of the Maori College: On Religion, Cosmogony, and History, Part 1, Te Kauwae-runga or 'Things Celestial'* (Vol 3, Memoirs of the Polynesian Society, New Plymouth, 1913); and John White *The Ancient History of the Maori* (Vol. 2, Government Printer, Wellington, 1889).

actions. When he eventually found his wife's people, he saw that someone was undergoing tā moko. Uetonga, Niwareka's father, a descendant of Hine Nui te Pō and Rūaumoko, specialised in tā moko. Mataora was intrigued because where he was from, moko was a temporary marking on the face that could be removed.

Mataora asked Uetonga about the differences in permanent and temporary tā moko. Uetonga explained that because their process of tā moko was permanent, it had more mana. Uetonga wiped the temporary tā moko from his son-in-law's face to show the worthlessness of a temporary tattoo. The people laughed at Mataora and he felt whakamā again. Mataora decided that he wanted to have a permanent moko and asked if Uetonga would to this for him and Uetonga agreed. The pain of the process was almost unbearable so Mataora began to chant to Niwareka to soothe himself.

On hearing this chant, Niwareka's sister told her about the stranger who was being tattooed by their father. They went to see who this man was, but blinded by the swelling from the tattoo, Niwareka did not recognise her husband at first. However, she did recognise his cloak because she had woven for him. Niwareka felt for his suffering and wept for him. When the moko eventually healed, Mataora asked Niwareka to return with him to Te Ao Tūroa. She was reluctant because that was an evil place where husbands beat their wives. She told him that she would need to consult with her whānau | family about it first. Uetonga was not happy and wanted Mataora to leave Niwareka in Rarohenga. He did not want his child hit again. Mataora was still ashamed of his actions. Mataora said to Uetonga that his commitment to never hitting Niwareka again was as permanent as "the moko I am wearing now will not rub off". Mataora and Niwareka prepared for their journey back to Te Ao Tūroa. Mataora was presented with some gifts, the knowledge of tā moko, but also a cloak called Te Rangihaupapa. Mataora was a person transformed by his renewed commitment to non-violence and creativity, a new identity in te Ao Turoa etched by tā moko deep into his skin.

A. Identity Documented in Tā Moko

Tā moko is specific to the person who wears it and has therefore been described as a personal identifier or signature. Ngarino Ellis has written a significant analysis of Māori use of moko as a signature.[15] She is Ngāpuhi and Ngāti Porou, and an Associate Professor at the University of

[15] Ellis, above n 12.

Auckland. She specialises in Māori art history and mātauranga Māori. In her article, she describes moko as the primary identity marker for Māori in the 18th and 19th century and the "visible expression of iwi, hapū and whānau 'family' identity."[16]

Ellis recounts the first known example of moko use as a signature from 1815 in Rangihoua in the Bay of Islands. The Rev. Samuel Marsden had bought more than 200 acres of land in the north for 12 axes. The moko of two chiefs, Te Uri o Kanae and Wharemokaikai, were copied on to the land deed to authorise the transaction. From that point on, Māori began to use moko, drawn on paper contracts, as a common form of signature when one was needed. Sarah Gallagher tells the story of Ngāti Toa Rangatira chief, Te Peehi[17] (*Portrait of Te Pehi Kupe,* 1826) who met with King Edward, and reportedly stated, while pointing to his own forehead "Europee man write with pen his name, Te Peehi's is here."[18] There is extensive evidence of rangatira using their own moko as a signature or statement of their personal identity. This includes signatures from eight rangatira on the 1840 Wentworth Indenture, a document which purported to purchase the entire the South Island and Rakiura totalling 20 million acres[19] and 44 examples of moko as signature from the Treaty of Waitangi.[20]

Ellis extends her analysis beyond the use of moko as a signature. She also considers that tā moko are used as portraits or self-portraits.[21] I will not detail that part of her analysis in my thesis, suffice to say that these analyses of tā moko as signature and portrait are important as "sites of cross-cultural exchange" and as mnemonic devices in contemporary times.[22] Ellis's analyses are about Māori interactions with settlers and Crown agents during the first century of colonisation. As such, she is considering how Māori are utilising their moko as 'written' legal proof of identity in their legal and political dealings with colonial and settler authorities. I suggest that in the Ellis analyses, the rangatira are using their tā moko as a legal instrument within the framework of the colonial legal system and not as the activation of the Māori legal tradition. I have not found evidence to show that rangatira routinely 'wrote' or copied their tā

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[16] At 30.

[17] See *Image 4* in the Appendix at page 143 for a reproduction of the *Portrait of Te Peehi*.

[18] Sarah Gallagher "'A Curious Document': Ta Moko as Evidence of Pre-European Textual Culture in New Zealand" (2003) 27 Bibliographical Society of Australia and New Zealand Bulletin 39 at 41. Sarah Gallagher is a Heritage Assessment Advisor at Heritage New Zealand Pouhere Taonga, author and publisher based in Dunedin.

[19] Ellis, above n 12, at 38. The sale was later nullified.

[20] At 58.

[21] At 30.

[22] At 30.

moko onto a surface (carved or otherwise) as proof of their identity in their political or legal interactions with each other. It doesn't appear then that tā moko were replicated or written as a signature for *Māori* legal purposes. The act of copying their own tā moko seems related to dealing with state law not Māori law.

B. Tā Moko as a Living Embodiment of Māori Law

Tā moko, as an expression of mana, goes much further in the Māori legal tradition than as a signature. I consider tā moko to be the living embodiment of Māori law. Māori law is literally written into the skin. The origin history of tā moko is not just about Mataora's identity. The history associates tā moko directly with the legal principle of mana.

Mana is intrinsic to the person but also flexible enough that it can be acquired and lost. Mana is associated not only with a person's inherent dignity and achievements, but it also impacts and is impacted by the person's whakapapa. In the origin story Mataora's shame at having his temporary tattoo wiped from his face by Uetonga was an injury to his mana. But although mana was lost at that time, Mataora was able to restore it by subjecting himself to the pain of a permanent tā moko. He also restored his mana by committing to non-violence in his marriage, a commitment he stated was as permanent as "the moko I am wearing now". Therefore, tā moko contains a visual language that describes the mana of the wearer, a legal principle carrying legal rights and responsibilities.

Sarah Gallagher writes about tā moko as text, suggesting that tā moko might be considered evidence of a "pre-European textual culture".[23] She argues that tā moko is "a sign system, a living document represented by meaningful marks on the human body" that was written and read.[24] She also argues that the individual designs themselves were well known and readable by others:[25]

> There is also evidence that people could identify others by their Moko without having met them: Polack reported that on several occasions he showed likenesses of chiefs, resplendent with Moko, to Maori living as far as 400 miles distant. These

[23] Gallagher, above n 18, at 39.

[24] At 41.

[25] At 45.

> Maori were able to identify the men by name from reading their likeness, having never met them previously.

Tā moko were understood to represent the rank and accomplishments of a person, although reportedly only for those born into a high rank or who had made significant achievements.[26] The placing of specific tā moko designs on specified places on the face conveyed accurate information to the reader where "each design was named and they were related to each other, resulting in a complex composition which could be read by others."[27] Tā moko designs could also be inherited by whakapapa.[28] Gallagher likened that process to typography where the placing of tā moko designs on the face and body was like the placement of letters in a document, making the tā moko designs readable.[29]

In Dan Simmons' seminal *Ta Moko*[30] he has recorded and illustrated many examples of tā moko. These examples all contain descriptions with information about the whakapapa and mana of the person. Simmons refers to Michael King in this regard:[31]

> King correctly characterises male moko as a badge in that it was widely believed to designate membership of a particular group and an individual's standing within that group. It could be evidence of his tribe, his rank and his masculinity.

It is acknowledged that tā moko can identify whakapapa and mana, as King describes, but it has not previously been described as *documentation* of the legal rights and responsibilities that are contained within the person's whakapapa and mana. I now suggest that there are examples where tā moko document a variety of legal statements about a person that have legal consequences. I will refer to two examples from Simmons to show how he described the information that could be read in the moko.

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[26] Ellis, above n 12, at 31.

[27] At 31.

[28] At 31.

[29] Gallagher, above n 18, at 44.

[30] DR Simmons *Ta Moko: The Art of Maori Tattoo* (Reed Books, Auckland, 1986).

[31] At 23.

1. Te Morenga

Simmons describes how, in 1815, Te Morenga of Te Uri-Kapana, Taiamai, Kaikohe, had used a pen to copy his tā moko[32] (*Te Morenga*, 1815*)* onboard the *Active*. J L Nicholas that had reproduced it in his book *Narrative of a Voyage*[33] in 1817:[34]

> "Te Morenga's own tattoo drawn for Nicholas in 1817 on board the rig *Active*. Te Morenga belonged to the Te Urikapana hapu of Ngati Hine, part of the Ngapuhi federation and lived at Taiamai near Kaikohe. The forehead design indicates that his mother was of a high ranking lineage but this did not apply to his father. The designs by the ear and chin would suggest that his mother belonged to a senior line connected with the East Coast and more particularly Hawkes Bay, though he himself belonged to Ngapuhi, as the style essentially belongs to that area when compared with earlier records."

This example of Te Morenga's tā moko contains a number of potential legal statements. His mother was of a senior rank within the East Coast in general and the Hawkes Bay in particular. By right of whakapapa and mana, this could give Te Morenga standing to use natural resources from the Hawkes Bay area to improve his and his whānau's wellbeing. That status would also enable him to use those resources to manaaki others, in effect providing him with an economic tool to engage in trade and creating reciprocal obligations for the benefit of his and his Hawkes Bay whānau. He would likely have equivalent obligations back to his Hawkes Bay whānau if he was to use those resources, as the legal principles of utu and kaitiakitanga would require him to manaaki the needs of his whānau there. That may include leadership authority rights to participate in rūnanga | council, hui | gatherings or other decision-making processes.

The set of rights due to him by his rank on his mother's side might also be counterbalanced by his apparently closer connection to Ngāpuhi on his father's side, evidenced from the general design of his moko. Simmons suggests Te Morenga's status on his father side would be of a lesser rank than his mothers. It is also possible that the Māori law relating to ahikā | occupation which affirms mana whenua by permanent occupation of an area,[35] could constrain his access

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[32] See *Image 5* in the Appendix at page 144 for a repoduction of the sketch of the tā moko of Te Morenga).

[33] JL Nicholas *Narrative of a Voyage to New Zealand Performed in the Years 1814 and 1815 in Company with the Rev. Samuel Marsden, Principal Chaplain of New South Wales* (Vol II, James Black, London, 1817) at 217, in D R Simmons, above n 30, at 51.

[34] Figure 27, Simmons, above n 30, at 51.

[35] See page 89 of this thesis for brief discussion of the Māori law concept of ahikā | occupation.

to the Hawkes Bay resources, but perhaps provide him better access to resources in the North. If he is closer to his Ngāpuhi side because that is where he most commonly resides, his access to the Ngāpuhi resources might be greater if he maintains ahikā there.

2. Drawing by HG Robley

In one of three drawings of a tā moko by HG Robley of an unnamed man (no image available), Simmons records highly detailed information based on the design and placement of the tā moko:[36]

1. Kohere, protector of the land and people.
2. Rank granted by the father, who has blessed him.
3. He was second in command of the gardens
4. In the boundary of Kohuiarau.
5. He is under the command of the Koroiti ko Tama.
6. Tribal chief under the age of twenty-five.
7. Mother of third lineage to taiopuru.
8. Rongowhakaata tribe of mother, father of Aitanga a Mahaki tribe.
9. His tribe is Rongowhakaata (Gisborne).
10. Protected by his mother's lineage.
11. Succession by birth but the children do not have the right to succeed.

In this example, there are similar potential legal rights and obligations inscribed in the tā moko as in the first example, but in more detail. This inscription identifies the mana | status of his parents which would identify his legal entitlements and obligations through whakapapa, mana whenua, ahikā, kaitiakitanga and manaakitanga. The tā moko also records his specific role within his hapū – second in command of gardens; the name of a person or whānau he works with and the area he works in. This could indicate his rangatiratanga authority, if any, to

[36] Figure 198, Simmons, above n 30, at 142.

participate in decision making within the whānau and hapū. It may also indicate the matters in which he could exert that rangatiratanga. If his primary responsibility is to the māra | gardens then he may also have kaitiaki responsibilities in respect of manaakitanga. He may also have kaitiaki authority to impose rāhui in relation to the māra. In addition the last entry records that he has whakapapa entitlements to succeed but his children do not. I cannot identify from this description what he may be entitled to succeed to, it may be land, or mana, or taonga or a mix of the three. I also cannot identify why his children will not have the same succession rights as he does, but I do consider that this is a clear statement of the whanaungatanga legal entitlements of him and his children.

More detailed analyses on the potential for Māori law to be written into tā moko needs to be done to confirm whether tā moko are a living embodiment of Māori law, as I suggest. There appears to be agreement that tā moko, at least in early contact times, documents the whakapapa and mana of the person. Simmons says that a "tradition persists…that moko can be read or understood to give information."[37] Ellis, who lists 50 separate examples of tā moko written as signature, says tā moko "were made as strong political statements about the *mana* of the men who drew them."[38] In contemporary times, it is difficult to tell whether those obtaining a mataora | full face moko or moko kauae | female chin moko are intentionally recording whakapapa information and if so, whether those people conceptualise that information as identity or law or something else. It is also unknown whether tā moko artists are routinely trained in the 'typography' of tā moko or trained in the individual designs that build the legal language of tā moko. Many of these artists may well be a new generation of mātanga | experts, even if they understand their visual language as communicating the values of tikanga Māori rather than the principles of the Māori legal tradition. It is not too great a step to understand the connection between the values of tikanga Māori and the legal principles derived from them, once that connection is articulated. Higgins, in her research reflects on the revitalisation of tā moko:[39]

> The revitalisation of ta moko among the younger generation of Maori encompasses a political dimension within a traditional Indigenous art form of beautification. As

[37] At 126.

[38] Ellis, above n 12, at 55.

[39] Tania M. Ka'ai, John C. Moorfield, Michael P. J. Reilly, Sharon Mosely (eds) "Te mana o te tangata whenua-Indigenous assertions of sovereignty" in *Ki Te Whaiao: An Introduction to Maori Culture and Society* (Pearson Longman, Auckland, 2003) at 187, in Higgins, above n 14, at 364.

> well as enjoying a reviving tradition, many Māori are wearing ta moko as a political statement of cultural integrity.

Whatever the many reasons people may now get a tā moko, it is demonstrated in this thesis is that information about whakapapa, mana, and other Māori legal rights and responsibilities can be written into the skin through tā moko.

III.Pou Whenua as Encoded Law

I will now look at pou whenua as whakairo Māori that can be encoded with law. Pou whenua are a form of whakairo | carving. They are tall upright carvings, placed in or on the ground. They are used to identify whakapapa | kinship, turangawaewae | place to stand and belong, rangatiratanga | sovereignty, and both the mana whenua and mana moana of whānau, hapū and iwi. They indicate responsibilities and obligations in relation to the use of important physical locations. They can be used to mark wāhi tapu | sacred places, to commemorate special events or people, to advise of mana whenua or mana moana authority, and to warn of potential dangers and hazards, both physical and spiritual.

Tā Mead says that carving was always intended to 'speak' or to be 'read'.[40] This intent is made clear in the origin story of carving. In Tā Mead's retelling of the origin story,[41] Manuruhi, the son of Ruatepupuke, who was himself a descendant of Tangaroa, asked his father to help him carve a powerful new fish hook so he could feed his whānau. His children were voracious eaters of kaimoana. Ruatepupuke did make the hook but advised his son that he was not to use the hook until Ruatepupuke could come with him and perform all the necessary karakia. When a new hook is made, the right karakia must be recited and the first fish caught with the hook must always be returned to Tangaroa.

But Manuruhi was impatient and he went out fishing without his father. The hook was powerful and Manuruhi caught many fish. But this magnificent new, powerful hook alarmed Tangaroa, who worried about the impact on his moko, the creatures of the ocean. Tangaroa was also insulted because first, Ruatepupuke had made the hook in Tangaroa's name without

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[40] Mead, above n 1, at 21.

[41] Hirini Moko Mead *Te Toi Whakairo The Art of Maori Carving* (5th ed, Oratia Media Ltd, Auckland, 2015) at 8. See also Te Ahukaramū Charles Royal *The Woven Universe* (Estate of Rev Maori Marsden, Otaki, 2003).

acknowledgement and second, that Manuruhi failed to meet his obligations by returning the first catch from the hook. In utu | response, Tangaroa changed Manuruhi into a tui and then took him into the sea.

Ruatepupuke, realising his son had disappeared, hunted everywhere for him and finally swam out into the ocean to look for him. He dived deep into the sea and saw a whole village of people under the sea and a spectacular whare, Hui-Te-Ana-Nui. Ruatepupuke could hear talking and so he went into the whare. He saw that the poupou on one side of the whare were talking to the poupou on the other side of the whare. The back wall was talking to the front wall but he realised the porch remained silent. Ruatepupuke looked up at the porch of the whare and saw that his son had become a tekoteko at the apex of the whare. His son though was on the outside and so could not speak to him. The poupou inside told Ruatepupuke why his son was now a tekoteko and Ruatepupuke was also now offended. Ruatepupuke waited until evening when all the village people had come back to sleep at the pa and then he set fire to the whare. He had taken down his son first and when all was destroyed inside, Ruatepupuke took the four pou from the porch outside and he and his son fled back home. Those pou and the tekoteko were considered the great prize and became the prototype for carving.

Tā Mead describes the significance of Ruatepupuke taking the silent pou instead of the speaking pou. He says that in creating speaking pou, Tangaroa showed that the purpose of poupou is to communicate. But Ruatepupuke was in a hurry to leave and left the talking pou behind. That means we have a design model for carving as movement, of 'speech' in a silent form that expert carvers understand in their work:[42]

> … good creators could make their poupou "talk" in a different way, in a silent language that could be understood by those observant people who understood the artistic code of communication. It could be said that the moment in the myths when Ruatepupuke looked up and saw his son Manuruhi trying desperately to speak to him is remembered in all carvings that show in open mouth "struggling to speak."

This whakapapa of carving shows that it was always intended that whakairo Māori would communicate important information. Māori understood that the pou would contain kupu that could be read and kōrero that could be spoken.

[42] Mead, above n 1, at 69.

A. Kaitiakitanga Documented in Pou Whenua

This section will describe how pou whenua can be used to make legal claims to a place – to exercise or claim kaitiakitanga responsibilities, through mana whenua rights. Pou are regularly used to demonstrate iwi authority over natural resources, as described by Lisa Tumahai, Kaiwhakahaere of Te Rūnanga o Ngai Tahu:[43]

> Pou whenua have always been important to our people. They establish a footprint and provide a tangible sense of Ngāi Tahu mana in our takiwā. Ngāi Tahu are the kaitiaki of this land; we must ensure it is protected for us, and our children after us. Pou are physical reminders of that responsibility. They will still be here in a hundred years, and their stories will continue being told from generation to generation – mō tātou, ā, mō kā uri ā muri ake nei.

Tumahai was responding to the placement of two six-foot tall pou whenua representing the tīpuna Tarapuhi and Mati Nohi Nohi near the Mokīhinui River in Kahurangi National Park. These pou are designed to activate the mana whenua and be the 'embodiment' of the whakapapa of Ngai Tahu and Ngāti Waewae in that area.

In another example within the Ngai Tahu takiwā | district, the pou *Tangaroa*[44] (2016) was erected at the entrance to the fishing grounds at Warrington Beach in 2016. *Tangaroa* was placed there by the kaitiaki of Puketeraki Marae on behalf of Kāti Huirapa, to warn of the consequences of overfishing. Brendan Flack, the then East Otago Taiapure management committee chairperson, was reported as saying[45]

> He stands there as a guardian, to make people think about their actions. Rather than a sign with a lot of words on it, this is another form of communication… In days gone by, everyone knew not to take seafood from sites where they saw pou.

From a kaitiaki perspective, the pou *Tangaroa* asserts mana whenua and mana moana. He specifically activates the authority of the kaitiaki. The pou is intended to describe the risks to the fish resources of over-fishing as well as prescribe what behaviour is tika | correct to prevent the hara | harm. The pou also contains warnings of the spiritual consequences of breaches of

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[43] James Harding "Pou Whenua, Establishing a Footprint" in 83 Te Karaka: The Ngai Tahu Magazine 22 at 23. The carving was led by Mahana Coulson.

[44] See *Image 6* in the Appendix at page 145 for a photograph of *Tangaroa* carved by Alex Whitaker.

[45] John Lewis "Pou set up to guard Warrington Domain" Otago Daily Times (online ed, New Zealand, 23 November 2016).

the correct actions. It is a legal statement from Kāti Huirapa about authority, resources and consequences.

B. Mana Whenua Documented in Pou Whenua

The authority of pou whenua as statements of mana whenua was a key question in the High Court decision in *Ngāti Maru Trust v Ngāti Whātua Ōrākei*.[46] Panuku Development Auckland was granted resource consent from the Auckland City Council to undertake development at the Westhaven marina. Ngāti Whātua did not oppose the development consent but made an application to the Environment Court opposing certain conditions of the consent, one of which was a condition requiring the placement of 19 pou whenua in the development area.[47] These pou whenua were to represent the 19 iwi authorities who have land interests in Tamaki Makaurau. Panuku Development had developed a Kaitiaki Engagement Plan with all 19 iwi authorities to assist the mana whenua to "express their tikanga and fulfil their role as kaitiaki".[48]

Ngāti Whātua argued at the Environment Court that the resource consent hearing panel was wrong for, among other things, failing to provide guidance as to which iwi had 'primacy' and for declaring that mana whenua had to decide primacy issues for themselves if such a decision was needed. Ngāti Whātua applied for a declaration from the Environment Court that the Environment Court had the:[49]

> "jurisdiction to determine which iwi holds primary mana whenua (customary authority) where relevant to the wording of the resource consent conditions and that "mana whenua" in the Auckland Unitary Plan (the AUP) is neutral and non-determinative as to the issues of primacy of customary authority."

The Environment Court declined to make the declaration and the issue was appealed to the High Court where Justice Whata determined that yes:[50]

> when addressing the s 6(e) RMA requirement to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands,

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[46] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Limted* [2020] NZHC 2768.

[47] *Ngāti Whātua Ōrākei Whaia Maia Limited v Auckland City Council* [2019] NZEnvC 184.

[48] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Limted,* above n 46, at [9].

[49] At [12].

[50] At [115].

> water, sites, waahi tapu and other taonga, a consent authority, including the Environment Court, does have jurisdiction to determine the relative strengths of the hapū/iwi relationships in an area affected by a proposal, where relevant to claimed cultural effects of the application and wording of the resource consent conditions.

While the larger issue in this case was how primary mana whenua status was to be determined in consent hearing matters involving multiple iwi authority interests in an area, the trigger was the resource consent condition that required 19 pou whenua to be erected. Ngāti Whātua considered those pou whenua to be Māori legal statements of mana whenua and as such the erection of pou by other iwi contravened Ngāti Whātua rangatiratanga.

Ngarimu Blair, Deputy Chair of the Ngāti Whātua Ōrākei Trust, gave evidence in the High Court hearing describing their importance:[51]

> Pou Whenua, or carved posts in their purist form, are statements of mana and authority akin to flag posts being stood and being flown in colonial history to claim rights to land. Pou Whenua can also be used to define tribal boundaries and to mark places of cultural significance. Placing Pou Whenua in this context would in cultural terms assign tribal mana and authority and be a signal of legitimate rights of an iwi to that particular place.
>
> Given the proposal was for 19 Pou Whenua, which reflects the wider Iwi, Ngāti Whātua Ōrākei took this as another example of the erosion of our customary rights and the elevation of status of many other iwi who cannot claim any customary rights to the land in the Auckland CBD to the same extent as Ngāti Whātua Ōrākei. We had no choice but to object to the proposals in the strongest possible terms.

Blair considered the placement of pou was a statement of the turangawaewae | place to stand for Ngāti Whātua. The turangawaewae of iwi is where their specific tikanga and their world view is paramount. Pou describes who holds mana on that turangawaewae and therefore whose rangatiratanga would apply by the assignment of "tribal mana and authority". This case illustrates the argument in this thesis because it demonstrates the legal value that Māori place on pou, within the Māori legal tradition. The court's view of pou is of interest because it triggered a contemporary iwi debate over the nature and validity of the encoded objects of Māori law. The court's view of pou does not, in and of itself, contribute to the questions this thesis considers.

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[51] At [21].

I suggest a pou is even more than a flagpole. It is an unequivocal visual declaration of rangatiratanga akin to a legal title or political territorial authority. The pou may describe the whakapapa of that iwi or hapū to the land and include representations of the upoko | leader who exercises rangatiratanga. The pou may warn of the spiritual or physical consequences of any breach of the mana whenua or a tapu | sacred or rāhui placed on the area. I believe the pou is a legal statement of mana and rangatiratanga, presented in an encoded object. It is able to be, and expected to be, read as such by others who understand Māori law and have the required visual literacy.

IV. Raranga as Encoded Law

Raranga or weaving is an art practice that ranges from the most simple and functional of domestic goods such as nets, kete | bags and rain capes to the most elaborate and beautiful, large, full-coloured korowai | cloaks of fur, flax and feathers that can take thousands of hours and exceptional skill to complete. It is an art form traditionally associated with women although not exclusively.[52] I am a weaver, particularly of taniko | embroidery and I learnt how to weave from my mother. It is an art form of both infinite practicality, flexibility and prestige:[53]

> ... kākahu are imbued with the mana of the weaver's tipuna, or ancestors, as well as her own and that of the wearer, and the ceremonies and occasions at which the cloak is later worn will further increase its prestige. These ancestral connects are an integral part of the garment and give kākahu their immense value.

There are a number of origin histories for raranga. One is described earlier,[54] where Mataora was given the korowai, Te Rangihaupapa, as a gift from his wife, Niwareka's people and brought it back from Rarohenga into te Ao Turoa. A similar origin story has been described where Mataora returned from Rarohenga with two gifts of raranga. One was the korowai called Te Rangi-haupapa and the other was a taniko belt called Te Ruruku-o-te-rangi.[55] It was this belt that provided the blueprint for taniko embroidery. Another origin history is described by

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[52] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2016) at 273.

[53] Awhina Tamarapa (ed) *Whatu Kākāhu: Māori Cloaks* (Te Papa Press, Wellington, 2019) at 12.

[54] See page 100 on the role of Mataora in the orgin of tā moko.

[55] Elsdon Best *The Maori as He Was: A Brief Account of Maori Life as It Was in Pre-European Days* (Dominion Museum, Wellington, 1934) at 192.

Gloria Taituha. She tells the story of the whakapapa of Hine te Iwaiwa, the daughter of Tāne. Hine te Iwaiwa is the primary atua | deity for raranga:[56]

> From the creation of light and the separation of Ranginui and Papa-tū-ā-nuku, [Tāne] began to yearn and seek for more space to grow and wedged his parents apart, thus creating the world of light. From the creation of light and the separation of Ranginui and Papa-tū-ā-nuku, he found Hinerauāmoa, the smallest and most fragile star in the heavens, who became the female element Tāne had been searching to create humankind. From their union came Hine-te-iwaiwa, the guardian of raranga and whatu, childbirth and also the cycles of the moon.

Hine te Iwaiwa is also acknowledged in *Whatū Kakahu* as the origin ancestor for raranga:[57]

> Hine-te-iwaiwa, who is also the personification of childbirth and the cycles of the moon, reflects the powerful life rhythms of women as nurturers and sustainers descended from the original female elements of Papatūānuku.

The recognition of Hine te Iwaiwa as the atua responsible for raranga, childbirth and the movement of the moon places raranga firmly in the realm of mana wahine. Tā Mead describes the 'whare pora' which, he says, is not a house as such but a collective of experienced weavers who together find and mentor young women to teach them the skills and the kawa | protocols of weaving.[58] The results of this extraordinary skill include taonga such as korowai, kaitaka | highly prized cloak, kakahu | clothing, piupiu | flax garment that swings, kete | basket, and whariki | mat. While these can all be domestic textile items used on a daily basis, they can also become extremely highly valued taonga.

Tā Mead describes 'hākari taonga' which are special feasts for displaying and exchanging taonga | treasures as part of a manaakitanga process.[59] The hākari taonga often used tahuaroa, large wooden frames erected in the open area in front of a marae or meeting area,[60] to hang "cloaks, blankets, floor mats and baskets" to which the guests would add theirs for later

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[56] Gloria Taituha "He kākahu, he korowai, he kaitaka, he aha atu anō? The Significance of the Transmission of Māori Knowledge Relating to Raranga and Whatu Muka in the Survival of Korowai in Ngāti Maniapoto in a Contemporary Context" (PhD Exegesis, Auckland University of Technology, 2014) at 7.

[57] Tamarapa, above n 53, at 21.

[58] Mead, above n 52, at 272.

[59] At 198.

[60] Ngārino Ellis "Te Ao Hurihuri O Ngā Taonga Tuku Iho: The Evolving Worlds of Our Ancestral Treasures" (2016) 39 Biography 438 at 441.

redistribution.[61] I note here that all of those taonga listed by Tā Mead are textiles, the products of raranga. Tapsell also describes how these taonga exchange hui were arranged for very significant iwi events such as peace-making, marriages or when land was acquired or relinquished.[62] There is no doubt that the art form of raranga was highly valued as taonga within te ao Māori. This was particularly so where the raranga was worn by or exchanged between high status individuals. In these cases, the korowai or kākahu could become highly tapu because of its bodily contact with a highly tapu person. When this happens, the raranga can take on unique and powerful qualities of prestige and meaning.

A. Te Kahumamae o Pareraututu

The history of Te Kahumanae of Pareraututu, the cloak of pain of Pareraututu is one such example (no image available). Paul Tapsell of Ngāti Whakaue and Ngāti Raukawa, is the Professor of Indigenous Studies at Melbourne University. He has written extensively about the kahumamae, as a descendant of Te Arawa and as participant in the process of returning her[63] from her owners, the Auckland War Memorial Museum, to Rotorua. The taonga history that I recount here is her story. I have set it out in full because it is a compelling story that will not be properly respected by a summary. It is recounted here as told by her great grand moko Hari Semmens directly to Paul Tapsell:[64]

> Until 1982 I had only heard of my Kuia dogskin cloak and I thought it no longer existed. But that year a cloak exhibition came to Rotorua. I visited the exhibition out of curiosity and that's when I saw her and put her on. People got upset, but they didn't understand, this was my kuia! The cloak felt right, she was warm and fitted exactly.
>
> My eyes were filled with tears as I remembered my old people talking about this great cloak and the maker, Pareraututu. She made it to honour the deaths of our people killed by Tuhoe in the battle of Pukaikahu. Pareraututu was part Tuhoe herself and on learning that her Urewera relatives had killed many of her Rangitihi menfolk, she became grief stricken. So my kuia collected all the dogs that had once

[61] Mead, above n 52, at 198.

[62] Paul Tapsell "The Flight of Pareraututu: An Investigation of Taonga from a Tribal Perspective" (1997) 106 Journal of the Polynesian Society 323 at 338.

[63] I refer to the kahumamae as 'her' in this thesis as a mark of respect.

[64] Paul Tapsell *Māori Treasures of New Zealand Ko Tawa* (David Bateman Ltd, 2006) at 60.

> belonged to the fallen Chiefs and wove their skins into our cloak of pain she did made a journey to the Waikato to plead with the renowned Ngati Maniapoto fighting leader, Tukorehu, to avenge the Tuhoe. Her method of persuasion used no words. Instead she sat silently upon Tukorehu's marae for days on end wrapped in the kahumamae and refusing to eat. Eventually Tukorehu's heart was so moved that he accepted Pareraututu's request by lifting the cloak from his shoulders and placing it on his own. I do not know if Tukorehu revenged the Tuhoe or not.
>
> Many years later when my Kuia died her bones were placed upon our mountain peak of Tarawera called Wahanga. I had always thought that our kahumamae, Pareraututu, was no more. The old people had no further knowledge than what I have just told you. After being passed to Tukorehu the cloak became his to look after and we never heard what happened. In our eyes she was gone, and most likely buried with someone of importance.
>
> Those were my thoughts up to the time I was reunited with my Kuia in 1982. I was so glad to embrace her and I thought Pareraututu had returned home for good. But then I learned she was going back to Auckland. I tried to talk to the museum to leave her here at home in Rotorua, to gift her back to us, the descendants. But no, they said that the Auckland Museum owned her. I was greatly saddened when she was taken away and I knew it was up to me her great grandson, to bring her back home. Every time I went to Auckland, I would visit Pareraututu, but I could not convince the museum people to let her go. No one wished to understand me. Perhaps Pareraututu will come home yet? If this was to happen, I shall die happy.

Tapsell was able to trace the journey of the kahumamae because the last individual to hold her, Captain Gilbert Mair, left her whakapapa details with the museum.[65] Mair was a New Zealand-born Englishman, and fluent te reo Māori speaker. He fought for the Crown in many of the most well-known battles including the Invasion of Waikato, against Te Kooti and against Tuhoe. However, he developed respectful and long-lasting relationships with many rangatira and was entrusted with the care of some 247 taonga during his lifetime. All of these taonga were gifted to the Auckland Museum at his death. And that include Te Kahumamae o Pareraututu. She had passed from Tukorehu to his grandson, Rewi Maniapoto, who sent it to Ihakara Tukumaru (from Foxton), who gave it to Poihipi Tukairangi, the "principal chief of Taupo" who gave it to Mair.

[65] At 61.

Tapsell was eventually able, over a two-year period, negotiate the loan of Pareraututu to the Rotorua Museum so that she could be reunited with her people on her ancestral land. However, she remains the legal property of the Auckland Museum. Tapsell describes the difficulty he encountered with arranging the transfer because of the de-personalisation of the taonga:[66]

> Apart from the physical barriers up distance in glass cases, visiting descendants also have been confronted with perhaps strange labels and a museum bureaucracy. These not only separate Taonga from the descendant and ancestral lands, but also depersonalised them as western art-objects that are institutionally redefined in terms of legal possession and insurance premiums.

Tapsell who has a deep knowledge of the kahumamae and her place in her iwi says:[67]

> Taonga are poignant reminders of the past, represented by the concepts of mana, tapu, and kōrero, which, when performed by elders on the marae, become symbolic illustrations of the kin groups ancestral identity to surrounding lands. Pareraututu demonstrates how taonga, if they still maintain their mana, tapu and kōrero can ritually re-enter today's tribal society and thereafter assist in the amelioration of life crises.

The history of Te Kahumamae o Pareraututu is very much an example of the palimpsest that Panoho describes, an object encoded with layers of history and, I suggest, law. She is estimated to be over 200 years old, made sometime around 1800.[68] She was given in iwi exchanges between various chiefs until being finally gifted to Mair, as a highly prized taonga, in 1889.[69] Her experience to that point was as a ‘taonga tuku iho’ that Tā Mead and Tapsell described.

Te Kahumamae o Pareraututu is first, and most importantly tūpuna – the physical embodiment of Pareraututu whose presence is quite literally felt by her descendants. This was the view taken by Ellis who has written about the kahumamae as biography.[70] This means that her mana would continue to grow because, as Tapsell suggests, mana does not necessarily diminish at death. Pareraututu has the characteristics of a person, containing mana, tapu and kōrero.[71]

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[66] At 61.

[67] Tapsell, above n 62, at 350.

[68] At 341.

[69] Ellis, above n 60, at 447.

[70] At 446.

[71] Tapsell, above n 62, at 342.

Her making is another layer of the legal kōrero that she carries. I would suggest her making was for the purpose of a petition for utu, and ea. Pareraututu spent three days wrapped in her, not eating, waiting for her petition for utu to be agreed and her entitlement to ea to accepted by Tokurehu. At her making she was encoded with law, a whanaungatanga request for a 'take-utu-ea' process. We do not know if she found the resolution she desired.

We can add to her that purpose the value of the kōrero, presumably now lost, that would have added to her mana each time she was part of a taonga exchange. As Ellis describes, taonga can be considered living beings, integrated into the whakapapa and history of the land and the people that they have an association with:[72]

> [i]n doing so, a taonga might have a number of tribal affiliations and associations, none more important than the other, and the tribes all fulfill the role of kaitiaki. Maori do not consider taonga able to be owned, but rather, as with the whenua, we are here to look after them until we can pass them on to the next generation.

Pareraututu was layered with the content of those histories, and she would have been expected to communicate those histories in her physical form to demonstrate her value for each chief she was presented to. In this way she both holds and gains mana:[73]

> Since then, Pareraututu has continued to accumulate ancestral power, adding to the mana, tapu and kōrero collected over the generations. Like the comet's tail, the blaze of this taonga's mana has grown far greater that the item itself and, because of its powerful identity-maintaining qualities to ancestral lands, it is not perceived by Pareraututu's descendants as inalienable.

She has also suffered the indignity and mistreatment that many Indigenous taonga suffer, during her years at the museum. The museum did identify her making as a kahumamae but it is unclear whether they provided much more information. The mana of the kahumamae was lost on the museum, because they understood her only as a piece of material culture for historical preservation. They knew her story in a superficial sense but without any respect for the legal purpose of her creation or for her ancestral role with her descendants. They did not demonstrate any understanding of her role in her whakapapa and were, at first instance

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[72] Ellis, above n 60, at 443.

[73] Tapsell, above n 62, at 350.

dismissive of the mana and whanaungatanga that she maintained with her descendants, particularly Hari Semmens.

And finally, she may now have a role in Te Arawa as a restatement and commitment of their rangatiratanga, of their *nationhood*. Tapsell describes her role in contemporary Te Arawa life:[74]

> Like the comets tail, the blaze of this taonga's mana has grown far greater than the item itself and because of its powerful identity-maintaining qualities to ancestral lands, it is now perceived by Pareraututu's descendants as inalienable.

Te Kahumamae o Pareraututu has become, in Tapsell's description, the embodiment of whanaungatanga for Te Arawa. She incorporates the cosmological, the ancestral and the divine as a taonga tuku iho, a 'gift from the ancestors to their descendants born and yet unborn'. She is a physical representation of whakapapa and therefore binds Te Arawa into a whanaungatanga relationship with her, and through her, with the land and with the atua.

V. He Mutunga

This chapter has brought together the educational theory of visual literacy, the art theory of encoded objects and the jurisprudence of Māori law and applied them to whakairo Māori to see if whakairo Māori could be said to document law. The research shows that designs tattooed onto the skin, in specific areas of the face, inscribe legal information about an individual. That information includes the law that is derived from the legal principles of mana, whakapapa, ahikāroa | title by occupation, manaakitanga, and rangatiratanga. These legal principles come with legal rights and obligations that are both identifiable by the individual and by others. This is Māori law encoded in the skin.

In the case of pou whenua, it is also clear from the examples that Māori intend that pou whenua communicate mana whenua, mana moana, rangatiratanga and kaitiakitanga. These are the legal principles for the assertion of whānau, hapū or iwi political and territorial dominance over a space. That political and territorial dominance includes the exercise of legal authority over that area. These principles of mana whenua, mana moana, rangatiratanga and kaitiakitanga create the legal tools that enable Māori to identify and protect natural resources and to use those

[74] At 350.

resources for political, economic and legal purposes, such as manaakitanga and utu. This legal power is encoded into pou whenua.

With raranga, given the breadth of uses of raranga and with only one example, I am not as easily able to argue that Māori law is encoded in raranga except in exceptional cases. There is no doubt that raranga has been used by Māori as taonga, such as the kahumamae. Pareraututu was a petition, the physical embodiment of encoded law and an agreement between Pareraututu and Tukorehu for the exercise of utu. She was a taonga exchanged in manaakitanga or similar Māori legal processes, from chief to chief. She is now a constitutional document recording the mana of Te Arawa. At each point she has been encoded with kōrero, a document able to be read for her value and her histories. More raranga examples might help demonstrate the extent to which they have also been used to document contracts or agreements, as Pareraututu was. It may be that raranga, particularly exceptional korowai, are a common legal documentation tool for manaakitanga, utu or muru. They may also have a role in documenting mana and rangatiratanga. And of course, they may have much broader rangatiratanga roles as Pareraututu has, over time.

More research is needed to understand better the depth and breadth of the possible non-written visual documentation of Māori law in whakairo Māori. However, I am confident that whakairo Māori can be a rich source of tikanga Māori and Māori law.

He Kupu Whakamutunga | Concluding Remarks

This thesis has set out a pathway by which we can consider whether Māori law is documented in whakairo Māori | Māori visual art. In the Introduction, I presented my thesis question, which I have addressed in two parts:

> Is Māori law documented in whakairo Māori?
>
> a. What are the non-written visual means of communicating Māori law?
> b. Can these non-written visual means help to communicate Māori law?

Chapter 2 began this inquiry by asking: Can we open our understanding of what law is? It presented an overview of the historical debate concerning Indigenous law, concluding that Indigenous de-centralised legal traditions occupy a footing as equally authoritative as that of Western, positivist legal systems. The chapter confirmed that Māori do have a legal tradition and that the character of Māori law is capable of description and analysis. After considering what Indigenous law is, I concluded that Māori are not constrained by the culturally bound ideas or definitions of Western jurisprudence. Indigenous legal scholars are researching and publishing more and more jurisprudence showing how Indigenous peoples conceptualise their legal traditions, their conflict resolution processes, and the values and principles on which those traditions and processes are based. Building on the foundations laid by Chapter 2, Chapter 5 discussed the principles of the Māori legal tradition in just this way. As more of this work makes its way into the legal and public domains, we can, with both respect and intellectual rigour, interrogate, contest, and extend those ideas, developing more Indigenous and Māori jurisprudence in response. This process of legal reasoning and inquiry is simply adhering to many centuries of a vigorous Indigenous intellectual tradition. This tradition is evident in the impact of tikanga Māori and Māori law in Aotearoa New Zealand's contemporary jurisprudence.

This thesis has also demonstrated that we can draw on theories from other disciplines to test and interrogate legal thinking to broaden our concept of law, and therefore the instruments of law. In Chapter 3, drawing on the concept of visual literacy, I showed how it was possible for Indigenous peoples to visually 'write' and read law without an alphabet, documenting their law in non-written visual forms. These non-written visual forms are culturally determined and connected to the way that Indigenous peoples view the world and their relationship to it,

including their legal relationships to each other, with their atua | deities, and with the natural world. To understand those non-written visual forms, it is necessary to understand the cultural context in which the visual mark- and object-marking is made. That can then lead to understanding how legal concepts might be encoded by those marks and objects. The two examples of visual literacy discussed in Chapter 3, the *Saltwater Collection* and the *Ngurrara Canvas II*, demonstrated that Aboriginal and Torres Strait Islanders have non-written visual documentation by which they communicate their law to themselves and to those outside their culture. The chapter on visual literacy provided a necessary theoretical insight into how Māori law might be encoded into whakairo Māori as a type of visual literacy.

In Chapter 4 I looked at how Indigenous law might be encoded into objects and demonstrated that objects have been encoded with legal information. The two examples of the Gwinu crest blankets and wampum belts from the First Nations peoples of Canada showed how those First Nations peoples made objects with the very clear intention that those objects would hold and communicate legal authority. In the case of the crest blankets, the K'san Historical Village and Museum entirely disregarded the legal quality inherent in the blanket, demonstrating how critical it is to understand the culture in which both the law and the object is being made.

In the wampum belt example, its legal authority was understood and even used by Crown agents to record legal agreements. This suggests that colonising nations during the 18th and 19th century were aware of the existence and force of both Indigenous law and the encoded objects of Indigenous law. Legally encoded objects can be found in Aotearoa New Zealand's state legal system as well. Earlier in the thesis I referred to the 'bar' as an encoded object.[1] Wigs and gowns, insofar as they are still used, are also encoded objects as costumes which signify status and denote the special powers of the wearers – for judges that includes the extraordinary power to imprison a person. Encoded objects of the law come with stories and histories that communicate social, political, and legal information. If we can understand that about the law that we live within every day, we may be able understand that better about Indigenous and Māori law as well.

In addressing the first subpart of my thesis question – What are the non-written visual means of communicating Māori law? – I established that, like state law does, Māori have encoded our visual language into objects to communicate our law. That visual language is evident in the complex and detailed meanings of tā moko | tattooing, etched directly in the skin as a living

[1] See page 41 of this thesis.

law. That visual language is also evident in pou whenua | land marker posts, prized encoded objects that announce the law to those who view them. And, in rarer cases, it is evident in raranga | weaving, which communicates social, political and legal information for a potentially more personal and constitutional purpose.

And finally, to the second subpart of my thesis question: Can these non-written visual means help to communicate Māori law? Speaking as a lawyer, I would suggest the answer established by this thesis is 'yes, but'. I believe that we can use whakairo Māori as a form of documentation to communicate Māori law, subject to three conditions.

First, we must be confident about the authority of Māori law. I have discussed the principles of the Māori legal tradition that operate as an integrated whanaungatanga legal framework. That framework includes legal practices such as whakawā, rūnanga and hui, and tools, such as tuku, muru and rāhui that give effect to those principles. The principles contain norms understood by Māori to set high standards of behaviour. Where a person fails to meet those standards, there are very real consequences of "serious social disadvantage" that they, and their whānau, hapū or iwi may suffer as a result. We need a broader discussion and more research on what the difference between tikanga Māori and Māori law is, how that difference, if it exists, is articulated, and what Māori law is and how we might communicate. In short, we need more Māori jurisprudence. And we need more research to clarify what law whakairo Māori is communicating, particularly with a view to iwi-specific legal orders and iwi-specific whakairo Māori. Understanding Māori law and whakairo Māori as a rich and layered palimpsest can only improve our understanding of them both and illuminate the fascinating relationship between the two. These are the kinds of matters we need to be thinking about as we consider how Māori law can be integrated into the LLB degree in Aotearoa New Zealand.

The second condition is closely connected to the first, which is the need to value and privilege mātanga ture | legal experts, those who have the knowledge of how to encode our law in non-written visual means, and to read it. This is a critical literacy skill in te ao Māori. I suspect that there is less emphasis on how whakairo Māori can operate as legal documentation in contemporary times because we have not had sufficient kōrero on our own legal tradition – what it is, how it works, and how it can be communicated. We have such a rich intellectual tradition, and we can apply it to our own forms of documentation and literacy. To do that we need our mātanga ture and mātanga whakairo to work together to grow our legal literacy.

The third condition is more unsettling, particularly as I have tried to avoid centring colonisation in this thesis. However, there remains a lingering political question raised by the thesis. However well-articulated our jurisprudence and however well we assert our political and therefore legal autonomy, the authority of Māori law as extant and operational is dependent, to at least some degree, on its recognition as such by the Aotearoa New Zealand state political and legal system. The history of the recognition of Māori law demonstrates just how fraught and variable it can be, and how quickly it can change. There is an increasing crossover of the two legal traditions in the contemporary practice of law and in theory of law. How the interface between the two legal traditions is managed over the next decade is critical to how we whakamana | empower our own legal tradition, its principles, its practices, and its documentation.

Māori are in the best position to lead this work on the interface, and they are doing so. The Māori intellectual tradition thrives in Aotearoa. Tikanga Māori and Māori law are practised every day, despite having suffered terrible blows in the past. However long the restoration of our polity and legal tradition may take, there is no stopping its progress now.

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Appendix – Reproductions of the Artworks Discussed

Image 1. *Bul'manydji at Gurala* 1997. Bunbatjiwuy Dhamarrandji (1948–2016), Australia National Maritime Museum Collection.

Image 2 *Ngurrara Canvas II* 1997. Mangkaja Arts Resource Agency Aboriginal Corporation, Fitzroy Crossing, Australia.

Image 3 *Two Row Wampum* (unknown date). Replica of the Two Row wampum of the Tawagonshi Agreement of 1613, Leddy Library, University of Windsor, Canada.

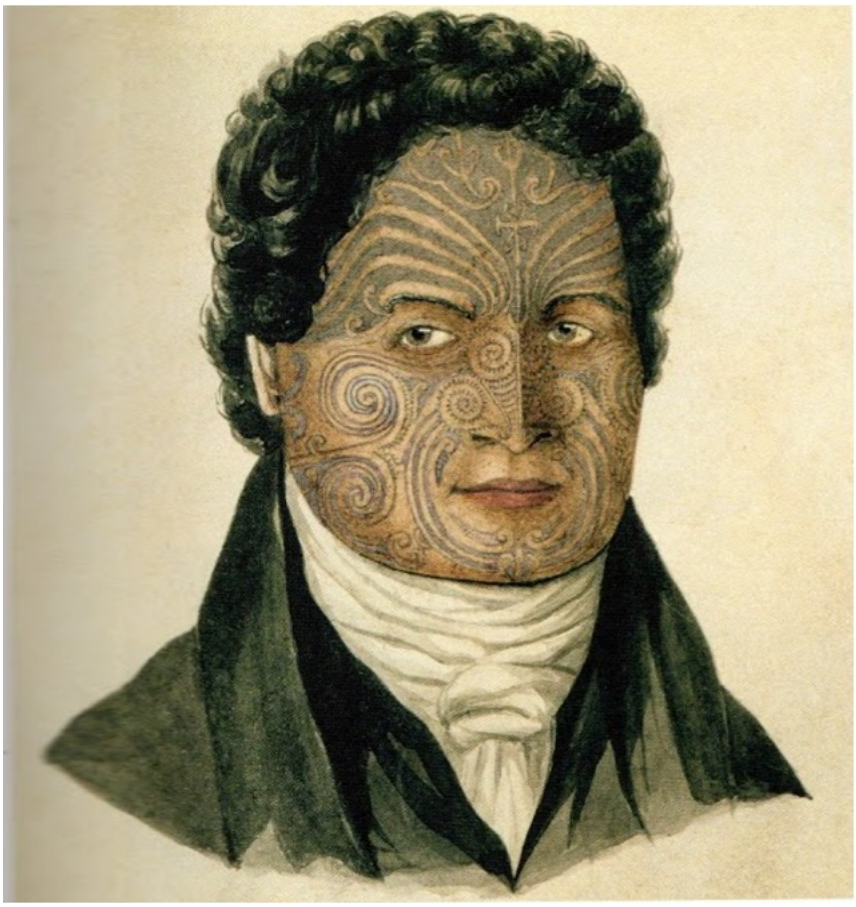

Image 4 *Portrait of Te Pehi Kupe* 1826. John Henry Sylvester. National Library of Australia, Canberra.

Image 5 *Te Morenga* (unknown date). Self-portrait recorded in John Nicholas *Narrative of a Voyage to New Zealand, Performed in the Years 1814 and 1815* (Vol II, James Black, London, 1817).

Image 6 *Tangaroa* 2016. Kāti Huirapa. Alex Whitaker, Warrington Beach, Dunedin.